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BY A. J. FAIRMAN,

AND THE COMMISSIONERS OF THE LAND OFFICE

Vol. LXX.

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AMERICAN STATE REPORTS.

VOL. LXX.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

**CHARLESTON & WESTERN CAROLINA RAILWAY COM-
PANY v. HUGHES.**

[105 GEORGIA, 1.]

EMINENT DOMAIN.—THE AWARD OF APPRAISERS in condemnation proceedings operates as a judgment between the parties, and is governed by the same rules that are ordinarily applied to judgments of courts. Such an award, or a verdict and judgment on appeal therefrom, has the same force as an ordinary judgment rendered by a court of competent jurisdiction. It is conclusive upon the parties and privies, but is not binding upon strangers.

EMINENT DOMAIN.—CONDEMNATION PROCEEDINGS—CONCLUSIVENESS OF—LIFE ESTATE AND REMAINDER.—If, at the time condemnation proceedings were had, there were two estates in the property, one a life estate, and the other a contingent remainder, the fact that it was impossible to ascertain the persons who would eventually take as remaindermen does not authorize the conclusion that the interest of such remaindermen was acquired by proceedings against the life tenant, who cannot be held to represent them.

EMINENT DOMAIN.—CONDEMNATION PROCEEDINGS—CONCLUSIVENESS AGAINST UNKNOWN OWNERS.—If the condition of the title to property at the time of condemnation proceedings is such that notice cannot be given to all interested, notice to such as are definitely known to be interested is not sufficient to deprive of their rights others whose identity is unknown, but whose interest in the property is ascertainable.

EMINENT DOMAIN.—JURISDICTION.—ONE WHO CANNOT BE AND IS NOT NOTIFIED, is not bound by the award or judgment.

EMINENT DOMAIN.—A RAILROAD COMPANY, by condemnation proceedings, acquires whatever interest the person against whom such proceedings are had has in the land, and no more.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS ARE NO MORE THAN A COMPULSORY SALE of all the owner's interest in the property, and no one can be thus compelled to sell who is not a party to the judgment rendered by the tribunal which is erected for this purpose.

EMINENT DOMAIN—INTEREST ACQUIRED BY RAILROAD COMPANY.—A railroad company which constructs its road over land, the title to which is not fixed and determined, acquires the interest of all those with whom it deals by negotiation or against whom it proceeds by condemnation, but takes the risk of other persons making claims in the future, whether they are left out of the negotiations or proceedings by mistake or from necessity.

EMINENT DOMAIN—ESTOPPEL—CONDEMNATION PROCEEDINGS against the assignee of a life tenant, to whom the entire amount awarded as damages has been paid, cannot be pleaded in bar of the right of the remainderman in the same property to have compensation for his interest after the termination of the life estate.

RAILROAD COMPANIES—ENTRY ON LAND BY CONSENT—ESTOPPEL AGAINST LANDOWNER.—If a railroad company enters upon land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a component part of its railroad that to surrender its possession would interfere seriously with the interests of the company or of the public, the landowner, though entitled to compensation for his property, is estopped from asserting against the company the legal title to the property by an action of ejectment.

RAILROAD COMPANIES—ENTRY ON LAND—EJECTMENT.—If a railroad company enters upon land and constructs its road either with the consent of the owner or without lawful authority, and the landowner acquiesces in the appropriation of the property to a great public use until it has become a necessary component part of the property acquired by the railroad to perform its public duties, the landowner must be held to have waived his right to retake the property in ejectment, and must be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated.

INTERVENTION IN EQUITY.—One who intervenes in a suit in equity, and prays for relief, both legal and equitable, is bound to admit and provide for all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of, or necessarily involved in, the subject matter of the controversy.

RAILROAD COMPANIES—ENTRY ON LAND—RIGHT TO IMPROVEMENTS.—If a railroad company lawfully enters upon land under conveyance from a tenant for life, and makes improvements necessary to its business, it has a right, upon abandoning the premises at the expiration of the life estate, to remove such improvements, and, if it continues in possession thereafter, the value of such improvements should not be considered in assessing the damages to which the remainderman is entitled. The amount which the latter is entitled to recover is the market value of the property at the time the life estate terminated, with interest, the value of such improvements placed on the property at the expense of the company and necessary to its business not being considered in ascertaining such market value.

S. J. Simpson, B. Cumming and H. Crawford, for the plaintiff in error.

W. K. Miller and J. R. Lamar, for the defendants in error.

² COBB, J. The last will of Charles De Laigle was duly probated and admitted to record in the court of ordinary of Richmond county on May 3, 1866. By the ninth item he made the following devise: "To my son Louis I give, devise, and bequeath three other such parts [meaning three-fourths of his estate after the payment of his debts] to be held by him in trust for the sole and separate use of my daughters, Martha, Mary, and Emma, one part to each respectively for and during the terms of their natural lives, with remainders to such child or children of my said daughters respectively as may be living at the time of their respective deaths, and, in default of such child or children, then to the right heirs of each of my said daughters respectively." After paying the testator's debts, his executors, on April 17, 1867, assented to the devise and allotted the property in which Emma De Laigle was interested to Louis De Laigle as trustee for her during her natural life, with remainder and executory devise over as mentioned above. At that time Emma De Laigle, the life tenant, was a minor and unmarried. Louis De Laigle, the original trustee, died in 1867 ³ after the division of the testator's estate, and on October 14, 1868, while Emma De Laigle was still a minor and unmarried, Andrew W. Walton, upon her application, was appointed as trustee for her alone by the judge of the superior court of Richmond county. She attained her majority on March 9, 1869, being still single. Walton resigned as trustee on March 5, 1869; and on the next day E. F. Verdery was appointed trustee for her alone, upon her application, by the judge of the superior court. No bond was required of Verdery, and none was given by him. In 1870, while Emma De Laigle was still unmarried, upon the joint petition of herself and Verdery, an order was granted authorizing Verdery to sell the fee in certain property for reinvestment, and it was sold by him under such order in that year. After the passage of this order Emma De Laigle married, and died on January 13, 1894, leaving one child surviving her, who was born on March 17, 1872, and who intermarried with one Hughes. After the passage of the order above referred to Verdery, the trustee, sold the property to Alfred C. Holt for the sum of four thousand dollars and conveyed the same to him in fee simple by a deed dated September 9, 1870. Verdery resigned as trustee after Mrs. Hughes was born. Thereafter, in proceedings regularly had in which Mrs. Hughes was a party, represented by her

mother as her next friend, Joseph B. Harris, her father, was appointed trustee in the place of Verdery and ordered to give a bond in the sum of four thousand five hundred dollars, and upon the giving of such bond Verdery was directed to turn over to him all the trust property he held as trustee for Mrs. Harris and her child. Harris, as trustee, gave the bond required. In 1872, the Port Royal Railroad Company, a corporation of this state, located its line of road across the land which had been acquired by Holt under the deed from Verdery, trustee. The company not being able to agree with Holt as to the compensation to be paid to him for the acquisition of the strip required for its purposes, condemnation proceedings were instituted against Holt to have the value of the same assessed in accordance with the provisions of the company's charter. The only parties to these proceedings were the railroad company and Holt. The amount fixed ⁴ by the appraisers not being satisfactory to the railroad company, an appeal was entered to the superior court, and on the trial there a verdict in favor of Holt for the sum of eleven hundred dollars was the result. No judgment was entered upon this verdict. The amount specified was subsequently paid to Holt, who conveyed the property in fee simple to the railroad company by a warranty deed dated May 8, 1873. The railroad company entered into possession and placed thereon a part of its tracks which were necessary to a complete construction and operation of the railroad which it was authorized by its charter to build. The Port Royal Railroad Company having mortgaged its entire property, including the strip acquired from Holt, to secure a large issue of negotiable bonds, and default in payment of the same having been made, in 1878 a decree of foreclosure was made by the circuit courts of the United States for the district of South Carolina and the southern district of Georgia; and under such decree a sale was had, at which certain persons representing the creditors of the corporation became the purchasers, and afterward conveyed the same to a new corporation created by the laws of the states of South Carolina and Georgia, and called the Port Royal & Augusta Railway Company. The latter company executed two mortgages upon its entire property to secure a large issue of bonds, and in 1893 default in payment upon these bonds was made. Thereafter a proceeding in equity was instituted in the superior court of Richmond county, to foreclose the mortgages executed by the railroad company to secure the issue of bonds above referred to, and a receiver was appointed to take charge

of the property and assets of the company. The strip of land which had been acquired by the Port Royal Railroad Company from Holt passed into the possession of the receiver.

On August 20, 1896, Mrs. Hughes, W. K. Miller, and J. R. Lamar presented a petition to the judge of the superior court, setting forth that they were the owners of the land in the possession of the receiver, which was described in the deed from Holt to the Port Royal Railroad Company; that upon the same there had been erected six railroad tracks which were now in the possession of the receiver and in use by him as a part of the "railroad yard and terminals in the city of Augusta; that Mrs. Hughes acquired title to the property under the will of Charles De Laigle, and became entitled to possession on the death of her mother, Emma De Laigle Harris, which occurred on January 13, 1894; that she had conveyed an undivided half-interest in the same to W. K. Miller and J. R. Lamar; that the property is of great value, to wit, five thousand dollars or other large sum, and that the railroad iron laid upon the same is the property of petitioners and is of the value of seven hundred and fifty dollars, and the yearly rental value of the property is six hundred dollars or other large sum; that the company is insolvent, in the hands of a receiver, and its assets in the state of South Carolina are also in the hands of a receiver, and its property is about to be sold under a final decree in that state, which sale is advertised to take place on the first Tuesday in September, 1896; that petitioners cannot obtain payment for the use of their land nor eject the receiver therefrom without the permission of the court. They pray that they be allowed to sue the receiver, and for mesne profits from January 13, 1894, and that, unless arrangements can be made for the purchase of the same, the receiver be ejected and possession be surrendered by the court to them; that pending the final determination of the issue, the receiver be enjoined from surrendering possession of the property in Georgia and the assets and income in his hands, until the final order of this court; and that the receiver hold up sufficient money to pay the judgment that may be rendered. On this petition the presiding judge passed the following order: "Read and sanctioned. Let this petition be filed. Petitioners are allowed to intervene in said cause, and to sue J. H. Averill, receiver of the Port Royal & Augusta Railway Company; and he and the said company are required to show cause before me on the thirty-first day of August, 1896, in the superior court room at Augusta, Georgia, why the prayer of the petitioners

should not be granted. In the meantime, he and the said company are restrained from changing the existing status of the said property or permitting the same to be sold in the state of South Carolina, as advertised, until the further order of this court. August 20, 1896." On August 31, 1896, the receiver "filed an answer to the petition of the intervenors, in which some of the allegations were denied, and others were neither admitted nor denied, for the alleged reason that the receiver was not informed as to the matter. It was alleged that when he was appointed receiver he found the Port Royal & Augusta Railway Company in possession of the property, and the same passed into his possession, and he is informed and believes that the railway company had been for many years in open and peaceable possession of the same, claiming it as its own, in good faith, adversely to the claims of all others. The prayer of the answer was that the intervenors be required to make strict proof of their allegations; and that if it be shown to the court that they are the owners and entitled to possession, he be allowed a reasonable opportunity to ascertain what will be a fair and reasonable price at which to acquire the lot and negotiate for the purchase thereof, subject to the final approval of the court; and that, in the event the intervenors and the receiver fail to come to an agreement as to the price to be paid, the question be submitted to a jury, and if the amount found in favor of the intervenors meet with the approval of the court, he have the option of acquiring the same at the price so found; that if, in the meanwhile, the property of the railway company shall have been sold in pursuance of the orders of the court, the purchasers have the option of acquiring the lot at such price. Thereafter on the same day the receiver filed an amendment to his answer, in which it was alleged that Charles De Laigle devised a certain parcel of land to trustees for the use and benefit of his daughter, Emma De Laigle; that Verdery was appointed successor to the trustee named in the will, and by an order of court made a deed to Holt, undertaking to convey the fee simple title; and that he is informed and believes that both Verdery, trustee, and Holt believed that the fee in the land was acquired by Holt, under the conveyance; that thereafter Holt executed a deed undertaking to convey to the Port Royal Railroad Company a fee simple estate in the land described in the petition of the intervenors, which is a portion of the tract which Holt acquired under the deed from Verdery, trustee; that Holt and the company believed that the fee simple title had been acquired; 7 that

thereafter the property of the Port Royal Railroad Company was sold and a deed to the same was made, including the land in dispute, to the Port Royal & Augusta Railway Company; that by virtue of the several conveyances, and in the belief that it had acquired a fee simple estate in the strip of land, the Port Royal & Augusta Railway Company entered upon and took possession of the same, and as its receiver respondent took control of it as the property of such company. It is further alleged that the first information that the receiver ever had that intervenors claimed title to the land in controversy was when their petition was served upon him.

On April 28, 1897, the receiver filed another amendment to his answer, in which it was set up that the Port Royal Railroad Company acquired a right of way over and through the premises sued for, by virtue of condemnation proceedings had in accordance with the powers conferred upon such company in its charter, as will fully appear by the record of the court in which the present case was pending, and that the receiver is the successor to the right so acquired by the Port Royal Railroad Company. On the same day the following order was passed: "The Charleston & Western Carolina Railway Company having purchased the property of the Port Royal & Augusta Railway Company, and being in possession of the said property and that sued for by B. H. Hughes et al., ordered that the said Charleston & Western Carolina Railway Company be allowed to defend the claim filed by B. H. Hughes et al., and to file the pleas this day presented." The pleas of the Charleston & Western Carolina Railway Company which were referred to in the order were, in substance, as follows: It denies that the petitioners, or either of them, have any right, title, or interest, at law or in equity, in or to the premises in dispute. It admits that the main line and tracks of the Port Royal Railroad Company were located and constructed over the strip of land sued for, about the year 1873, and that ever since that time the land and the tracks thereon have constituted an indispensable portion of the main right of way and railroad of that company and now of the defendant, and that the same has been operated continuously as a part of the public highway from Port Royal to the city of Augusta for ⁸ more than twenty years. It admits that Mrs. Hughes was the only surviving child of Emma De Laigle Harris, and that the latter died on the date alleged; the land sued for was once owned by Charles De Laigle, and passed under his will to Louis De Laigle as trustee for Emma De Laigle and her children; that

Walton was appointed trustee to succeed Louis De Laigle, and that Verdery was appointed to succeed Walton; that on September 9, 1870, upon the joint petition of Verdery, trustee, and Emma De Laigle, the sale of the property was authorized, Emma De Laigle at that time being the only beneficiary of the trust in esse; that in accordance with the order the land was sold to Holt, the trustee conveying to him in fee simple; that the purchase money (four thousand dollars) was paid in cash to the trustee, who invested it for the benefit of the trust estate; that subsequently Verdery resigned the trust after Mrs. Hughes, the petitioner, was born, and that on the petition presented by Mrs. Hughes on her own behalf and as next friend of her daughter, Joseph B. Harris was appointed trustee; that Verdery fully accounted for the amount received by him and paid the same over to Harris, trustee, after the execution by Harris of a bond required by the order of court; that Mrs. Hughes has never repudiated or disaffirmed the petition that was filed in her behalf, or restored the money paid for her use; that the Port Royal Railroad Company had acquired the premises in dispute as a right of way under condemnation proceedings which were authorized by its charter; that under such proceedings it acquired title and went into possession, and at great cost proceeded to construct the main track of its railroad, placing thereon divers sidetracks which were necessary for its use, and completed the construction of its entire railroad from Augusta to Port Royal, South Carolina; that the property passed from the Port Royal Railroad Company to the Port Royal & Augusta Railway Company by virtue of the decree rendered in the foreclosure proceedings brought by the bondholders of the former company; that in 1893, in the foreclosure proceedings had against the Port Royal & Augusta Railway Company, under authority of the orders of court passed therein, receiver's certificates to the amount of one hundred thousand dollars were ⁹ issued, and declared to be a first lien upon the entire line of railroad in the possession of the receiver; that none of such certificates were ever paid, and that the entire property of the railroad was sold because of the nonpayment of the same, together with a large amount of the other indebtedness of the receiver, amounting to not less than one hundred and fifty thousand dollars; that the defendant became the purchaser of the Port Royal & Augusta Railway Company at such sale, and received a conveyance of the same from the master; that under the law of Georgia the trustee of such a trust as was created by the will of Charles

De Laigle was not only for the benefit of the life tenant, but was to preserve the contingent remainders, and that Mrs. Hughes and her grantees are concluded; and especially, under the sale of the trustee to Holt, that Mrs. Hughes elected to ratify and affirm the sale when she applied for the appointment of Joseph B. Harris as trustee, under which order the purchase money received by Verdery, trustee, was recognized as representing the entire estate in the property and turned over to Harris, trustee, as such; that Mrs. Hughes well knew all of the facts, and when she became of age did not disaffirm such transaction or undertake to avoid the condemnation proceedings until August, 1896, and stood by and allowed the railroad company to occupy that portion of its right of way, many times a day using the same for the handling thereon of trains carrying passengers, freight, and mails; that petitioners are not entitled to maintain an action of ejectment or destroy the unity of the property as maintained and enjoyed for more than twenty years, and thus deprive the public of the benefit of a completed and operated railroad.

The court sustained a demurrer to the plea of the Charleston & Western Carolina Railway Company, and this ruling is the basis of one of the assignments of error in the main bill of exceptions. Thereafter the Charleston & Western Carolina Railway Company offered the following amendment to its pleading: "Now comes the Charleston & Western Carolina Railway Company, admitted to defend against the intervention of B. H. Hughes and others, and presents for refileing under the sanction of the court its original answer, and protesting against any judgment or decree against ¹⁰ it, and reserving the right to except thereto, and reserving also all exceptions heretofore made and the right to insist thereon, for an amendment to the original prayer of the answer prays that the court order that if any verdict or decree is rendered against this defendant, the Charleston & Western Carolina Railway Company, that it be not one of ejectment, but a money verdict for the value of the land, upon the payment of which this defendant may retain the premises in dispute." The presiding judge refused to allow the original answer to be refiled with the amendment, and this is assigned as error. While the original answer of the defendant was stricken on demurrer, it appears from the record that at the trial of the case all of the evidence which would have been admissible under such an answer was admitted, and the facts appearing in such evidence are set forth in the first part of this

statement. After all the evidence was submitted, the judge directed the jury to find for the plaintiffs the premises in dispute, but that the railroad iron thereon was the property of the defendant. Upon this verdict a judgment was entered for the plaintiffs against the defendant for the land in dispute, directing a writ of possession to issue, and authorizing the sheriff, on demand of the plaintiffs, to put defendant, its agents and servants, out of possession. Thereupon the defendant excepted, and the plaintiffs by cross-bill complained of rulings which will be hereafter referred to. The errors assigned in the main bill of exceptions were: 1. The court erred in sustaining the demurrer to the original answer of the defendant; 2. The court erred in refusing to allow the defendant to refile its answer with the amendment so as to have a money verdict against the receiver, because, if under the evidence petitioners show a title in them which would ordinarily authorize a recovery in ejectment, there should in the present case be a finding for a sum of money, or a decree authorizing the receiver to acquire the premises by the exercise of the power of eminent domain enjoyed by the Port Royal & Augusta Railway Company. The assignment of error in the cross-bill of exceptions was, that the court erred in directing the jury to find for the defendants the iron rails and other improvements located upon and permanently attached to the railroad, ¹¹ it being insisted that such rails and other improvements, being permanently attached to the railroad, should pass with the real estate.

1. The item of the will of Charles De Laigle under which the petitioners derived title was construed by this court in the case of *Fleming v. Hughes*, 99 Ga. 444. It was there held that the legal title passed to the trustee as to the life-estate only; that the remainder created was a legal and not an equitable estate, and that therefore the order of sale which was granted on the application of Verdery, trustee, did not authorize the sale of any other interest in the land than the life estate of Emma De Laigle. The only interest acquired by Holt under such sale being the life estate, that was all that he could convey. By the terms of this decision the title to the fee vested in Mrs. Hughes upon the death of her mother on January 13, 1894. It appears, therefore, that all the issues raised in the present case involving the question of title are conclusively settled by the case cited.

2. The Port Royal Railroad Company was incorporated by an act of the general assembly, approved December 19, 1859; and

by its charter it was declared that "the said company shall possess and enjoy the same privileges as to right of way as are vested in, and enjoyed by, the Central Railroad & Banking Company of Georgia": Acts 1859, p. 324. In the charter of the Central Railroad & Banking Company it was provided that that company should have power to construct a railroad, "paying to the owners of lands through which the same may pass a just indemnity" for the value of the land covered by the railway and the right of way on either side thereof. If the company could not acquire the title to the right of way by purchase, it was provided that the amount of damage or injury occasioned by the construction and maintenance of the road should be ascertained and determined by the award of three appraisers, one to be chosen by the company, one by the "owner," and one by the inferior court of the county where the land lay; and if the "owner," should decline to appoint an appraiser, then two were to be appointed by the inferior court, the finding of the appraisers to operate as a judgment for the amount against the company, ¹² either party having the right to appeal from the award of the appraisers to a special jury in the superior court. It was provided that "the decision shall vest in the company the fee simple of the land in question, and in the other party a judgment for its value." In making the valuation the appraisers, and in case of appeal the jury, should take into consideration the loss or damage which may occur to "the owner" or "owners" in consequence of the land being taken, and also the benefit and advantage to be received from the construction of the railroad: Prince's Digest, 331, 332; Acts 1835, p. 217. It will be seen that, under the charter above quoted from, it was contemplated that the right of way should be acquired by purchase from the "owner" of the land, and that upon failure of the company and the owner to agree upon the amount to be paid, condemnation proceedings could be had in the manner above referred to, and that the persons against whom such condemnation proceedings must be instituted were the owners of the property—that is, the same persons with whom the company would be required to negotiate for the purchase of the property. The persons, therefore, who are the owners and who would have to be consulted if a purchase at private sale was desired, are ones who should be made parties to the condemnation proceedings. If the person in possession of the property was not clothed with the power to make a conveyance of the interest of another in the same property, then such person could not acquire the right

to dispose of the interest of the other party by submitting to condemnation proceedings to which the other person at interest was not a party, nor deprive the other of his right to assert his interest, whatever it may be, against the corporation instituting the condemnation proceedings. If a life-tenant could not convey to a railroad company for a right of way the interest of a remainderman, the most solemn judgment that could be rendered in condemnation proceedings, to which the railroad company and the life tenant alone were parties, could not operate as an estoppel upon the remainderman. It becomes necessary in the present case to determine whether, in condemnation proceedings instituted under the provisions of the charter referred to against a person who was the assignee of the ¹³ life tenant, the interest of a contingent remainderman, who was not in esse when the proceedings were had, passed to the railroad company. The award of appraisers in such proceedings operates as a judgment between the parties, and is governed by the same rules that would ordinarily be applied to judgments of courts; and such an award, or a verdict and judgment on appeal from the same, has the same force as an ordinary judgment rendered by a court of competent jurisdiction. It is conclusive upon the parties and privies, but is not binding upon strangers. If at the time the condemnation proceedings were had there were two estates in the property, one a life estate, and the other a contingent remainder, the fact that it was impossible to ascertain the persons who would eventually take as remainderman upon the happening of the contingency provided for in the will would not authorize the conclusion that the interest of such remaindermen was acquired by proceedings against the life tenant, who under no circumstances could be held to represent them. If the condition of the title to the property at the time of the condemnation proceedings is such that notice cannot be given to all interested, notice to such as are definitely known to be interested would not be held to be sufficient to deprive of their rights others whose identity was unknown, but whose interest in the property was ascertainable.

Condemnation proceedings pass title to whatever interest the parties who took part in the proceedings have in the property, and a party who could not be notified is not bound by the award or judgment. In such cases the railroad company would fail to acquire a perfect title to the property; and this imposes no greater hardship upon a railroad company than it does upon any other person who desires to purchase property in which there

is a contingent interest outstanding in some one whose identity cannot be determined at the time of the purchase. The condemnation proceedings are no more than a compulsory sale of all the owner's interest in the property, and no one can be thus compelled to sell who is not a party to the judgment rendered by the tribunal which is erected for this purpose. Therefore a railroad company which sees proper to construct its railway over land where the title is in the condition above ¹⁴ referred to acquires the interest of all those with whom it deals by negotiation, or against whom it proceeds by condemnation, but takes the risk of other persons interested making claims in the future, whether they be left out of the negotiations or the condemnation proceedings by mistake or from necessity. In the present case, condemnation proceedings against the assignee of the life tenant, to whom the entire amount awarded as damages was paid, is pleaded in bar of the right of the remainderman in the same property to have compensation for her interest after the termination of the life estate. This cannot be the law. For if so, the right of the legislature to confiscate in the interest of public improvements under the guise of condemnation proceedings would be complete, it being only necessary that one person who was interested in the property should have notice, and by such notice the interest of every other person would be held to pass, although ignorant of the proceedings under which their property was taken. Under the ruling made in the case of *Fleming v. Hughes*, 99 Ga. 444, *Emma De Laigle* had only a life estate in the property, and this was the only estate acquired by Holt under the purchase from Verdery, trustee. Holt, therefore, represented no one but himself, and in the condemnation proceedings instituted against him his interest in the land was all that could be affected by the judgment. As he did not acquire the interest of Mrs. Hughes, and as it is not pretended that any part of the money paid to him by the railroad company was ever paid over to Mrs. Hughes, or to any one authorized to represent her, or was ever used for her benefit in any way, the condemnation proceedings, if they had terminated in a regular judgment, instead of a conveyance voluntarily executed by Holt in accordance with the verdict of the jury, could not be used against Mrs. Hughes to raise either an estoppel by record or any other estoppel which would have the effect of preventing her from asserting her rights in the property. Under this view of the case, it is unnecessary to determine whether the condemnation proceedings were invalid on account of one

of the arbitrators not having been regularly appointed, or whether the railroad company waived its rights under the condemnation proceedings by taking the deed from ¹⁵ Holt. Holt was lawfully in possession of the life estate under the conveyance made to him by Verdery, trustee, and he had a right to sell that interest, and the same passed to the railroad company under the deed which he executed to it after the verdict had been rendered in the condemnation proceedings. In the case of *Bentonville R. R. Co. v. Stroud*, 45 Ark. 278, it was held that it was incumbent on the railroad company which was seeking a condemnation of a right of way to ascertain the owners of the land and make them parties to the proceedings, and by selecting the parties against whom it proceeded it admitted their ownership. In the opinion, Cockrell, C. J., referring to the rule above stated, says: "The company alone can start the proceedings, and when it does so it must proceed against the owner, and it selects the parties to be proceeded against at its peril, because, by starting the proceedings against them, it admits that they are the owners. This is no hardship on the company. The records and other means of information are open to it, and if the title to the land to be taken is uncertain or in dispute, it may bring all persons who appear to be owners or part owners into court, and, when the damages are assessed and paid into court, leave the contending claimants to settle among themselves their controversy as to the fund awarded."

3. When a railroad company, without warrant or authority, enters upon the land of another, it is, as a general rule, no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a necessary component part of its railroad that to surrender its possession would interfere seriously with the interests of the company, the landowner, although entitled to compensation for his property, might, by his conduct in allowing the entry upon his land and permitting the company to so use it as that it could not be abandoned without great prejudice to its rights, estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law ¹⁶ which govern in all transactions of the character above referred to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether

the corporation be public or private. A railroad corporation, being one charged by the law with the performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line of railway, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the landowner acquiesces in the wrongful act and the consequent appropriation of the property to a great public use until the same has become a necessary component part of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such ¹⁷ other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. If this is the case in reference to unlawful entry, for a stronger reason the same result would follow if the entry by the railroad company in the first instance was by the authority or consent of the landowner, even though it be under a parol license and the legal title to the land still remain in the landowner. The current of modern authority sustains the prop-

osition that when a railroad company is in possession of land, using it as a right of way, although not having acquired the legal title thereto, the landowner would be estopped from ejecting the company from the premises if it was shown either that the original entry was with his consent, or that the entry without his consent was so long acquiesced in that to allow the company to be ejected would either dismember the property of the company, or essentially interfere with its ability to discharge the public duties incumbent upon it. This, however, is subject to the qualification that the landowner is entitled to compensation for his property and this must be ascertained and paid to him before the corporation is vested with a complete right to hold and enjoy his property as its own.

In the case of *Indiana etc. Ry. Co. v. Allen*, 113 Ind. 581, the general rule is stated to be, that when land is seized by a railroad company without right the owner may maintain ejectment; but where there has been an acquiescence on the part of the owner until public rights have intervened, such action will not lie, but the landowner will be confined to a recovery of compensation. In *Louisville etc. Ry. Co. v. Beck*, 119 Ind. 124, it was held that: "A landowner who stands by without demanding compensation, until a railroad company has so far completed and put in operation its road over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment to recover his land. The only remedy left to the landowner, in such a case, is to proceed within the proper time to have his damages assessed and enforced against the railroad company." In the case of *Galveston etc. R. R. Co. v. Pfeuffer*, 56 Tex. 66, it was held that where land was appropriated by a railroad company without authority the right of the owner to compensation was not waived by his standing by and permitting the company to construct its road over his land, nor was his right to recover the land lost if the company refused to make compensation. In the case of *McAulay v. Western etc. R. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627, it was held, where a landowner acquiesced in the occupation of his land for the construction of a railroad, without requiring prepayment of damages upon a contract for future payment by the company, and the road was constructed and put in operation, that he could not afterward, on failure to obtain payment, maintain ejectment or trespass for the land: See, also, *Roberts v. Northern Pac. R. R. Co.*, 158 U. S. 1; 3 Elliott on Railroads, sec. 1049. In those cases where it has been held that the landowner would be en-

titled to bring suit against the company in ejectment, and where a judgment in ejectment was allowed to be rendered, it was also held that upon appropriate pleadings the issuing of a writ of possession would be stayed until the company could be allowed a reasonable time in which to acquire title to the property, either by purchase or condemnation, or that the enforcement of such a judgment in ejectment would be enjoined for a similar reason: *Pittsburg etc. R. R. Co. v. Bruce*, 102 Pa. St. 23; *Pittsburg etc. R. R. Co. v. Jones*, 59 Pa. St. 433; *Conger v. Burlington etc. Ry. Co.*, 41 Iowa, 419; *Jacksonville etc. Ry. Co. v. Adams*, 33 Fla. 608. In the case of *Young v. McKenzie*, 3 Ga. 31, it was held that an action of ejectment against a bridge company to recover property in its possession, and necessary for the purpose of building the bridge, but to which the title had not been acquired either by purchase or condemnation, should be enjoined until the bridge company should have a reasonable time to comply with the terms of its charter in reference to condemning the property for its use. In this case there had been an attempt to acquire the land by condemnation, which failed for the reason that the proceedings before the appraisers were recorded in the wrong place. Under color of this authority the land was entered upon and the bridge built, and this was one of the reasons which brought the court to the conclusion that in equity the company should not be ejected until an opportunity had been afforded it to acquire the land by condemnation.

¹⁹ It is contended however, in the present case, as the title acquired by the railroad company under the deed from Holt was for the life estate of Emma DeLaigle only, that upon her death the title immediately vested in Mrs. Hughes, and that the possession of the railroad company, relatively to Mrs. Hughes, became wrongful and unauthorized, and that therefore she is entitled to treat it as a naked trespasser upon her property, she having done nothing which would amount to a consent on her part to the appropriation of the property by the company, and the lapse of time between the death of her mother and the filing of the suit not being sufficient to have amounted to such an acquiescence as would deprive her of the right to maintain an action of ejectment against the company. Nothing appears in the record which would amount to an estoppel against her. There was no evidence that she received any part of the money which was paid to Verdery, trustee, when the property was sold to Holt, nor that any part of the same was

ever used for her benefit; nor has there been any ratification of the acts of those persons who attempted to convey to the railroad company her interest in the property; nor has the time which has elapsed since her right of entry been of such duration as to show an acquiescence in the wrongful appropriation of her property. The case should be treated as one in which the owner of the land who is asserting title against the railroad company never consented to its occupation by the company, either by herself or by anyone authorized to represent her. But while this is true, we think that, under the circumstances of this case, Mrs. Hughes should not be allowed to treat the company as a naked trespasser. Its entry upon the property in the lifetime of Emma De Laigle was lawful and authorized. At the time of its entry, and so far as the record shows, up to the time of the claim now set up by Mrs. Hughes, it and its successors believed that they had acquired a fee simple title to the property, the deeds under which they claimed purporting to convey such an estate. Their right to possession after the death of Emma De Laigle was at least colorable. It has been said that "an original entry by the consent of a tenant for life is lawful, and will not subject the party enjoining to an action for damages ²⁰ on the part of the remainderman, although damages have not been paid": Mills on Eminent Domain, sec. 142. The statement above made was quoted approvingly and followed in the case of Chicago etc. Ry. Co. v. Goodwin, 111 Ill. 273; 53 Am. Rep. 622. In the case of Austin v. Rutland R. R. Co., 45 Vt. 215, it was held that where a railroad company had entered into possession of property with the consent of the life tenant and continued to use and possess the same after the termination of the life estate, to the exclusion of the remainderman, and without appraisal or payment of damages, the remainderman could not maintain ejectment against the company. Even if we were disposed to do so, it is not necessary for us to go to the length of the decisions just cited. We are of opinion that the petitioners in the present case have waived their right, if any they had, to insist in the first instance upon a judgment in ejectment against the railroad company, not by anything they have done before they instituted their suit, but by the way in which they have brought their suit and the character of the same and of the relief prayed in the original petition. The assets of the Port Royal & Augusta Railway Company were in the custody of a court of equity through the medium of a receiver, and he had possession of the property now

in controversy. The petitioners did not apply to this court for leave to go into a common-law court and assert there a strict and technical common-law right; but they applied to this court of equity to be allowed to come in and make themselves parties to the pending suit, and set up their right in such suit against the receiver and the company which was represented by him; and they prayed for a judgment declaring them to be the owners of the property described in their petition, and that they be placed in possession of the same, if the court should decide in their favor; and distinct prayers were made for an order in the nature of an injunction against the receiver to prevent him from delivering any of the property in Georgia to those who might become purchasers under the order of court in the state of South Carolina until the issues raised by them should be determined; and, further, that the receiver should be required to retain in his hands a sufficient sum of money to pay the judgment that might be rendered in favor of petitioners. ²¹ On this petition the court passed an order allowing the petitioners to intervene in the cause, and granted an order restraining the receiver from changing the existing status of the property, or permitting the same to be sold in the state of South Carolina, as petitioners alleged was about to be done. The petitioners have not only resorted to a court of equity to set up their claim, but they have come in praying in their behalf distinct equitable relief. They practically concede that a contingency may arise in which the parties in possession of the land claimed by them would be authorized to purchase the same, such being the inevitable inference to be drawn from the prayer asking that a sum of money be impounded in the hands of the receiver for their benefit.

“He who would have equity must do equity, and give effect to all equitable rights in the other party respecting the subject-matter of the suit”: Civ. Code, sec. 3924. The meaning of this maxim is, “that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the

defendant such corresponding rights as he also may be entitled to in respect of the subject matter of the suit": 1 Pomeroy's Equity Jurisprudence, sec. 385. Anyone going into a court of equity and asking its aid, whether that aid be such as could be obtained in a court of law, or whether it be of a character obtainable only in a court of equity, submits himself to the jurisdiction of the court, and in asking its aid subjects himself to the imposition of such terms as well-established equitable principles would require. Especially would this be true where the relief sought by the party applying to the court is both legal and equitable in its nature. No one can read the facts of the present case without being impressed that there is an overwhelming equity in favor of this railroad ²² company being allowed to purchase from the petitioners the property owned by them, and which is so necessary to the complete operation and maintenance of the company's road in the discharge of its public duties. Whatever might have been Mrs. Hughes' rights against the company if she had sued at law, or if she had obtained leave of this court of equity to have maintained at law an independent suit against the receiver or other persons in possession, under the remedy which she has elected she is bound to submit the subject matter of the litigation to the adjudication of the court upon equitable principles. Her right to insist upon a judgment of ouster in the first instance is therefore gone, if the defendant desires to insist upon its right to purchase the property; and the pleas of the defendant, which set up its right to have the value of the property passed upon by a jury, that they might be given an opportunity to purchase and pay for the same, were good in substance, and should not have been stricken. It is contended, however, that as the defendant is a foreign corporation, and as it has no authority under the laws of this state to acquire property by condemnation, it had no right to come into court and file a plea asking that what was equivalent to a condemnation be had in the pending suit. While it is not a corporation organized under the laws of this state, by comity it is permitted to come into this state, and is here discharging public duties of the nature usually performed by corporations of that character, and it is as fully under the control of the laws of this state in regard to the discharge of such public duties as if it had been incorporated under our laws. As a foreign corporation it has the right, until stopped by the state, to maintain and operate its railroad within the limits of this state. In order to exercise this right, the property in con-

troversy is an essential part of its right of way and terminals. Such being the case, the equity in its favor, requiring that the court of equity to which petitioners have applied should accord to it the right to acquire by purchase the possession of the property before a harsh judgment of ouster should be rendered against it, is just as strong as if it had authority to acquire possession of the property under the exercise of the power of eminent domain. The equity in favor of ²³ a railroad company, in such a case, does not grow out of the right it might have under the law to acquire title to the property in which it happens to be in possession, but it grows out of the fact that it is in possession of the property; that the entry of its predecessor in title was lawful and authorized; and that the same has become a necessary component part of the property of the corporation, which is discharging duties of a public nature. The court should have allowed the pleas filed; and, after the damages had been assessed by a jury, a decree should have been entered, allowing the defendant a reasonable time, to be stated in the decree, to pay the damages so assessed, and, upon its failure to pay the same within the time specified, that the petitioners recover the land and writ of possession issue.

4. The judge of the superior court directed the jury to return a verdict in favor of petitioners for the land in dispute; and directed them also to find that the railroad iron thereon was the property of the defendant. This latter ruling is the one complained of in the cross-bill of exceptions. It appears from the record that the railroad iron referred to in the verdict was the tracks which had been placed upon the land in controversy by the railroad company as a part of its main track between its terminal points, and also sidetracks used as a part of its terminals in the city of Augusta. It is apparent that these improvements were made upon the property with no intention on the part of the railroad company to improve the value of the estate, but solely for its uses and purposes in its business as a common carrier of freight and passengers. Upon the termination of the life estate which the railroad company acquired under the conveyance from Holt, did the title to these improvements vest in the remainderman at the same time that the title to the land vested? In the case of *Elwes v. Maw*, 3 East, 38, Lord Ellenborough reached the conclusion, after an elaborate examination of authority, that buildings and the like, erected by a tenant upon the leased premises for the purposes of agriculture and necessary for the occupation of the farm and the im-

mediate profits of the land, were not removable by the tenant even during his term; but that such improvements as were placed by the tenant upon the premises—for purposes of ²⁴ trade were not governed by the same rules, and were removable by the tenant at any time before the expiration of his term. This decision was followed by the supreme court of the United States in the case of *Van Ness v. Pacard*, 2 Pet. 137. The same doctrine is recognized in the case of *Carr v. Georgia R. R. Co.*, 74 Ga. 73, though what is said in that case is merely obiter. In *Meigs' Appeal*, 62 Pa. St. 28, 1 Am. Rep. 372, it appeared that during the Civil War the United States authorities erected certain buildings used as military barracks and hospitals in the borough of York. After the war had ended and the buildings were no longer used by the government, they were offered for sale, the purchaser to have the privilege of removing the same from the premises. The authorities of the borough applied for an injunction to prevent the removal of the buildings, alleging that they were of a permanent nature, attached to the realty, and therefore became the property of the borough, and could not be removed after the government had abandoned the use of them for the purposes for which they were erected. It was held that the buildings thus erected being placed there at the time when the necessities of the government required the same for military purposes, when the conditions requiring their use ceased to exist the government had a right to remove the same from the premises. In the case of *Wagner v. Cleveland etc. R. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770, it was held that stone piers built by a railroad company as a part of its railroad, on lands over which it had acquired a right of way for its road, did not, though firmly imbedded in the earth, become the property of the owner of the lands as part of the realty; and that when the railroad company abandoned the purpose of completing the railroad it had a right to remove such structures from the premises as personal property; and the fact that the landowner had been allowed to take possession of the land embraced in the right of way and hold it for a term of years less than is required to extinguish the easement, did not, in itself, imply a relinquishment on the part of the railroad company of its right to enter and remove the piers. In the case of *Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456, it was held that a railway track, or other improvement wrongfully placed upon ²⁵ land by a railway company, and not abandoned to the owner of the premises, cannot be treated as a part of the realty for the purpose of increasing

its value in estimating the damages due to the owner in subsequent proceedings to condemn the land for the use of the company. In *Justice v. Nesquehoning etc. R. R. Co.*, 87 Pa. St. 28, it was held that where a railroad company was a trespasser and its entry upon land not in conformity to law, structures placed upon the property, for use by the company in its business did not pass to the landowners, and their value was not to be included in an assessment of damages in proceedings afterwards instituted to acquire the property. In *Chicago etc. Ry. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622, it was held that a railroad company which had entered upon land and constructed its road over the same under a license from the life tenant would not be required to pay to the person entitled to the property, after the termination of the life estate, the value of the structures which had been placed upon the property at its own expense: See, also, *Elliott on Railroads*, secs. 997, 998.

In the present case, at the termination of the life estate, if the railway company had abandoned the possession of the property without removing the improvements which it had placed thereon, such improvements would probably have passed to the remainderman; but under the facts of this case, where it remained in possession, using the same in discharging public duties which were incumbent upon it, although its possession would be, in some sense, wrongful as against the remainderman, it is not to be treated, as has been shown, as a naked trespasser. It would have had the undoubted right, under the authorities above referred to, to remove from the premises the structures which it had placed thereon at any time during the existence of the life estate. As it had a right to remain upon the premises and have their value ascertained in order to acquire a complete title to the same, the mere fact that at the time of the assessment these improvements were still upon the property does not require that they shall be dealt with as the property of the land owner. Therefore, the petitioners having gone into a court of equity, in assessing the damages which should be paid to them the value of the improvements should not be considered. The ²⁶ amount which the plaintiff would be entitled to recover would be the market value of the property at the time the life estate terminated, with interest from that time to the date of the verdict, the value of the improvements placed on the property not being considered in ascertaining such market value.

5. Under the rulings we have made, the only question to be determined upon another trial of this case would be, what com-

pensation should be paid to the petitioners for the interest of the remainderman in the property? As all other questions are finally settled by this decision, direction is given that this single issue be submitted to a jury, and that they determine it in accordance with instructions given by the trial judge, following the rulings we have made. When the amount to be paid to the petitioners is thus ascertained, a decree should be entered, allowing the railway company a reasonable time in which to pay the amount thus found, and upon payment of the same, the title to the property to vest in the railway company. Upon a failure to pay the same within the time limited, the right of the company to acquire the property should be decreed to be lost, and a writ of possession should issue to enforce the judgment in ejectment already rendered in the case.

Judgment on main bill of exception reversed with direction; on cross-bill affirmed.

. All the justices concurring.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—CONCLUSIVENESS.—A judgment of a court having jurisdiction to award damages in a proceeding to condemn lands for railroad purposes is conclusive upon the parties thereto as to all questions therein actually litigated, as well as all matters necessarily within the issue joined, although not formally litigated: *Atchison etc. R. R. Co. v. Boerner*, 34 Neb. 240; 33 Am. St. Ry. 637; *Atchison etc. Ry. Co. v. Forney*, 35 Neb. 607; 37 Am. St. Rep. 450. Conclusiveness where the damages are assessed by commissioners: *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359; 53 Am. Dec. 212.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—WHO BOUND.—A bona fide purchaser of land is not affected by proceedings for its condemnation to public use, pending at the time of the purchase, if he had no notice of such proceedings, and no notice of his pendens had been filed: *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; 73 Am. Dec. 575. The owner of a limited interest in property is entitled to compensation: *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447. A railway company, authorized to condemn lands for a right of way, cannot condemn a temporary use, nor a use contingent on the happening of a future event: *Hibernia R. R. Co. v. De Camp*, 47 N. J. L. 518; 54 Am. Rep. 197.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—CONDITIONS PRECEDENT.—Bona fide effort to agree for the purchase of property acquired for a railroad crossing is a condition precedent to a resort to proceedings for the condemnation thereof, and must be alleged in the petition of the company instituting such proceedings: *Toledo etc. Ry. Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564; 4 Am. St. Rep. 875.

EMINENT DOMAIN—TAKING PROPERTY BY CONSENT. The consent of owners of land taken for public use by a statute may be subsequent, presumed, and tacit, as well as previous and positively expressed: *Wellington, Petitioners*, 16 Pick. 87; 26 Am. Dec. 631.

RAILROAD COMPANIES—ENTRY ON LAND—EJECTMENT. Where a railroad company relies only upon a grant of a right of way from an alleged owner in entering upon land to construct its road, the subsequent grantee of the real owner may maintain ejectment against the company. Where the company knew the true owner, the true owner may maintain ejectment, and is not estopped by the fact that he was present when the grant was made, and encouraged its execution by his words or his silence, and afterward permitted the company to construct and operate its road for eleven years without objection: *Richards v. Buffalo etc. R. R. Co.*, 137 Pa. St. 524; 21 Am. St. Rep. 892. When ejectment cannot be maintained: *McAulay v. Western etc. R. R. Co.*, 33 Vt. 311; 78 Am. Dec. 627.

INTERVENTION—RIGHTS OF INTERVENORS: See *Clapp v. Phelps*, 19 La. Ann. 461; 92 Am. Dec. 545; *Thompson v. Chauveau*, 7 Mart., N. S., 331; 18 Am. Dec. 246.

RAILROAD COMPANIES—ENTRY ON LAND—RIGHT TO IMPROVEMENTS.—Where a railroad company takes possession of land and constructs a track on it with the consent of the person in possession, under claim and color of title, and the paramount owner afterward sues for damages, the railroad company cannot be compelled to pay for improvements made by itself: *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158; 55 Am. Rep. 242; *Louisville etc. R. R. Co. v. Dickson*, 63 Miss. 380; 56 Am. Rep. 809; *Mississippi etc. R. R. Co. v. Devaney*, 42 Miss. 555; 2 Am. Rep. 608.

WYATT v. ROME.

[105 GEORGIA, 312.]

MUNICIPAL CORPORATIONS—ENFORCEMENT OF VACCINATION ORDINANCE—LIABILITY FOR DAMAGES.—A municipal corporation is not liable to a citizen who may sustain damage on account of impure vaccine matter administered to him by the officer or agent of such corporation in the enforcement of an ordinance requiring citizens of the city to submit to vaccination.

MUNICIPAL CORPORATIONS ARE NOT LIABLE FOR THE NEGLIGENCE OF ITS OFFICERS or agents in executing sanitary regulations adopted for the purpose of preventing the spread of contagious disease.

Action to recover damages for injury alleged to have been caused by the use of impure virus in the vaccination of plaintiff. Judgment for the defendant, and plaintiff appealed.

C. A. Thornwell and Fouché & Fouché, for the plaintiff.

³¹³ **LEWIS, J.** The right to prescribe regulations looking to the preservation of the public health is one of those sovereign powers that belong to the state. This power can be delegated by the state to any of its subdivisions of government, such as a municipality or a county, and in the use of it by such sub-

divisions they are in the exercise of a function purely governmental. As a general rule, a subordinate branch of the government is not liable for injuries sustained by anyone growing out of negligence, misfeasance, or nonfeasance of its officers and agents who are charged with the duty of enforcing laws or ordinances enacted for the public good in the exercise of a governmental ³¹⁴ function, and not in the exercise of a private franchise. The exceptions to this general rule are not founded so much upon principle as judicial precedents. The rule itself is based upon a principle as old as English law, that "the king can do no wrong." It is upon this idea that the sovereignty of a state protects it against suits by its subjects, no one having a right to hold it liable for any act of its officers or agents, unless such right is expressly granted by the state itself. When a municipality exercises a governmental power conferred upon it by the state, it is just as if the state itself were in the exercise of the function thus conferred. Among the precedents which have been established by courts of last resort that are apparently exceptions to this general rule, we have been able to find none that would hold a city liable for any injury that may be sustained as the result of enforcing measures legally enacted for the promotion and preservation of the public health. On the contrary, authority is abundant and almost limitless establishing the non-liability of a municipality in such cases. We do not think this is an open question in this state, for it has practically been decided in the case of *Love v. Atlanta*, 95 Ga. 129; 51 Am. St. Rep. 64. The reasoning for the decision in that case given in the lucid opinion of Justice Atkinson follows the uniform trend of judicial expression, and is especially applicable to the case at bar. On page 133 he says: "If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys." Upon the same line, and practically in point, we cite the following as a few of the many decisions and authorities on

this subject: 15 Am. & Eng. Ency. of Law, 1164, 1165, with citations; 2 Dillon on ³¹⁵ Municipal Corporations, sec. 977; Tiedeman on Municipal Corporations, sec. 332; Sherbourne v. Yuba County, 21 Cal. 113; 81 Am. Dec. 151; Summers v. Commissioners, 103 Ind. 262; 53 Am. Rep. 512; in which it is decided that "counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskillful or incompetent physician for the care of the poor"; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499, in which it is ruled that "a city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept." The city in the present case was in the exercise of a most important function of government, in which not only the inhabitants of the city but the public at large were interested. The measure in question which it adopted looked to the prevention of the spread of a contagious and serious malady with which it was at the time perhaps threatened. To allow any citizen a right of action on account of injuries real or supposed that he may have suffered in the interest of the public good would be to paralyze the arm of the municipal government, and either render it incapable of acting for the public weal, or would render such action so dangerous that the possible evil consequences to it, resulting from the multiplicity of suits, might be as great as the smallpox itself. Hence the wisdom of the law in exempting it from liability on such an alleged injury as is set forth in the petition. It was not contended, either in the pleadings or argument, that the city of Rome did not have the right to pass the ordinance requiring its citizens and residents to submit to vaccination. On the contrary, the suit was not based on any alleged want of authority in the city to legislate on the subject, but solely on the negligent manner in which the city, through its officers and agents, enforced this ordinance.

Judgment affirmed.

All the justices concurring.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF OFFICERS.—A city while acting, not in the management of its private or corporate affairs, but in the interest of the public, and as the guardian of the health, peace, convenience, and welfare of the public, is not liable for the negligent acts of its officers or employés engaged in the execution of its ordinances: *Whitfield v. Paris*,

84 Tex. 431; 31 Am. St. Rep. 69. A municipal corporation is not liable for the negligence of a physician for the poor, unless the corporation is shown to have been negligent in his selection: *Summers v. Board of Commrs.*, 103 Ind. 262; 53 Am. Rep. 512.

HOWARD v. CASSELS.

[105 GEORGIA, 412.]

GUARDIAN AND WARD—PARTIES.—If a testamentary guardian enters into a contract for the purchase of land, pays part of the purchase money with the funds of his minor wards, and gives a note in his representative capacity for the balance, such wards are not necessary parties, and cannot complain that they are not made parties to a suit by the vendor to recover on such note.

GUARDIAN AND WARD—CONTRACT FOR PURCHASE OF LAND—PARTIES.—If a contract for the purchase of land entered into by a testamentary guardian, under which part of the purchase price is paid with funds of his wards, is authorized by law or the terms of the will, the guardian, as the legal representative of the wards, is the only necessary party to a suit by the vendor to recover the balance of the purchase price, and judgment against him binds the property of the wards in his hands, and, if such contract is not within the power of the guardian to make, it binds him in his individual capacity only, and does not bind the property of the wards.

GUARDIAN AND WARD — MISAPPROPRIATION OF FUNDS.—If an unauthorized purchase is made by a guardian with the funds of his ward, the guardian, and all other persons who, with a knowledge of such illegal use, participate in the conversion of such money, are liable to the ward.

GUARDIAN AND WARD—RATIFICATION OF UNAUTHORIZED CONTRACT.—If a guardian enters into an unauthorized contract for the purchase of land, pays part of the purchase money with the funds of his ward, and gives a note in his representative capacity for the balance, the ward cannot claim the fruits of such contract, and deny the right of the vendor to proceed against the property for the balance of the purchase money. If the ward ratifies the illegal act, such ratification relates to the contract of purchase, and he must ratify the contract as an entirety. He cannot take the part only which is favorable to him, but he must also take that other part which makes the land liable for the balance of the purchase money.

GUARDIAN AND WARD.—RATIFICATION by a ward, by claiming the fruits of his guardian's unauthorized investment, precludes a denial of the vendor's right to proceed against the property purchased according to the contract to recover the balance due. The ward must adopt and ratify the whole contract or none of it.

Townes & Nicholes, for the plaintiffs.

Arnold & Arnold, for the defendant.

414 LITTLE, J. The plaintiffs seek to set aside a judgment in favor of *Inman v. George W. Howard*, their testamentary

guardian. They allege that they were not made parties to the action; that they had a good defense to it, which was that the note sued on was given by Howard, their guardian, in his capacity as such, and did not bind the plaintiffs, nor should such judgment be a lien on their property, because the testamentary guardian did not have the power to encumber the estate of the minors in any manner; and, referring to the judgment, they pray that it be declared null and void as against them and their property, and that it be set aside. We cannot see the necessity for the decree prayed for. If it be true that the guardian ⁴¹⁵ had no legal power to enter into a contract which would bind the property of his wards, then they were not bound by such contract, nor would it be necessary for their protection that they should be made parties, and urge a defense in a suit on a contract which did not include them in its obligations. If the guardian alone was sued on the note, and the minors were not parties, they would not be bound by the judgment rendered. If, on the contrary, the guardian had the power to bind the property of his wards by his promise to pay, then the property of the wards would be bound by virtue of the power he had to make the contract; but in neither event would it be necessary to make the minor wards parties defendant in such an action. The suit in which the judgment was rendered was based on a promissory note executed by the guardian. This note he was personally bound to pay. There was, as we understand it, no effort made to obtain a judgment binding the property of the wards; but a judgment by default was rendered against the guardian, his contract being unconditional. No judgment is set out in the pleadings, and of course we have no means of ascertaining its character. It makes no difference that the judgment rendered designates him as the guardian of the plaintiffs; it is, nevertheless, only a personal judgment. "A judgment against a party, as guardian, is no more than a judgment against him without the addition, that being only a descriptive personae": *Tobin v. Addison*, 2 Strob. 3. Our Civil Code, section 2555, declares: "The guardian cannot . . . by any contract other than those specially allowed by law, bind his ward's property, or create any lien thereon." In *Story on Promissory Notes* the rule governing the question is laid down as follows: "And as to trustees, guardians, executors, and administrators, and other persons acting *en autre droit*, they are by our law generally held personally liable on promissory notes, because they have no authority to bind *ex directo* the persons for whom,

or for whose benefit, or for whose estate they act; and hence to give any validity to a note they must be deemed personally bound as makers": See *Lovelace v. Smith*, 39 Ga. 130. In *McFarlin v. Stinson*, 56 Ga. 396, this court ruled that an executor could not bind the estate of his testator by a promissory note ⁴¹⁶ executed by him and signed as executor; and in *Gaudy v. Babbitt*, 56 Ga. 641, it was in terms held that this rule has not been relaxed as to executors, administrators, or guardians; and in *Harrison v. McClelland*, 57 Ga. 531, it was held that a note signed as administrator bound the maker individually. So that, if our reasoning be correct, the promissory note given by Howard as guardian bound him individually; and if no power was conferred on him by the will which created him guardian to so bind the estate of his wards, then while the judgment rendered became a lien on his property, it did not create any lien on the property of the latter. We do not mean to say that there are no contracts entered into by guardians which can be enforced against the property of the wards; there may be, but where such is the case, it is brought about generally, not by virtue of the contract alone, but as a result of an equity in favor of the promisee. In all such cases, however, the pleadings and proof must show the subsisting equity. As a matter of law, guardians of the property of wards are trustees, whose powers over the property of their cestui que trusts are defined by law. Among these powers are not included the execution of a contract binding the estate of his wards; hence, where such a contract was sought to be enforced against him, it was not necessary that the wards should be made parties to the suit; and inasmuch as the judgment rendered on such contract created no lien on the property of the wards, there can be no reason for entertaining the petition on their part to set aside such judgment. In this case the guardian was invested with his power by will. It was entirely competent for the testator to fix his powers, and it was also competent for the testator to confer on the guardian the power to contract, and by his contracts bind the estate of the wards. If this power was conferred by the will, then the contract made by the guardian depends for its validity on that instrument, and the effect of the judgment rendered on such a contract is determined, not by the law regulating the powers of guardians, but by the powers given him by the will. But if we admit that in this case power was given to him to bind the property of his wards by his contract as guardian, even in that case the wards are not necessary parties in ⁴¹⁷ a suit to enforce such contract,

because the contract of the guardian is authorized to be made, and, when made, to bind the estate of the ward, by the terms of the will of the donor who had the power to annex such conditions.

2. The petition alleges that the guardian of the plaintiffs purchased a described tract of land for the sum of two thousand five hundred dollars; that he only paid two thousand dollars of the purchase price, and gave his promissory note for the remaining five hundred dollars, signed by the maker as guardian. It further alleges that the guardian had sufficient property belonging to the wards to pay the entire purchase money for the land, but that he did not do so. It alleges that the note was traded to Inman; that it was sued to judgment, and that the execution issuing on such judgment was levied on the land so purchased, which was sold under the execution and bought by Cassels, who was put in possession. It further alleges that Howard, the guardian, at the time of the purchase received a bond from Pendleton, conditioned to make title to him as guardian on payment of the balance of the purchase money as expressed in the note. The plaintiffs allege that they have tendered to Pendleton the balance of the purchase money as expressed, and have demanded a deed to the land and possession; and they pray that the sheriff's deed to Cassels be canceled, that Pendleton pay to Cassels the amount paid out by the latter, and that Pendleton be required to make a deed conveying the land to the plaintiffs. In other words, the plaintiffs allege that it was an illegal act for their guardian to make the purchase, but that he did make it, and paid two thousand dollars of money belonging to them as part of the purchase money. Under these circumstances, they claim the benefit of the purchase, and insist that they have the right, on payment of the balance of the purchase money, to have a title to the property and possession. Thus they seek to ratify a part of the transaction; but at the same time they repudiate that part of the contract which reserved title to the land in Pendleton, with the right in the latter to proceed against the land for the collection of the balance of the purchase money. We think this cannot be done after suit for balance of purchase money and a sale of the land under the judgment ⁴¹⁸ therein obtained. Conceding the purchase made with the funds of the wards to have been illegal, then the guardian is liable to the wards for the money so illegally used; and this is true not only of the guardian, but of all other persons who, with a knowledge of such illegal use, participated in the conversion of their

money. Under well-settled principles, the wards can follow the money, so paid, into the hands of anyone who received it with a knowledge of their rights and of the illegality of the transaction; but it is not consistent to ratify an illegal investment made by the guardian and repudiate a part of the contract by which the guardian undertook to pay the balance of the purchase money before he received a title. The rule is, that the principal cannot ratify a part and repudiate a part. He must adopt the whole contract or none: Civ. Code, sec. 3021. And a ratification relates back to the act ratified: Civ. Code, sec. 3019. See also, *Hunter v. Stembridge*, 17 Ga. 243; *Perry v. Mulligan*, 58 Ga. 479; *Barclay v. Hopkins*, 59 Ga. 566. So that if the plaintiffs claim this land, such claim must be based, either on a ratification of the action of their guardian in making the purchase, or because their money went into the purchase. If they ratify the illegal act, such ratification extends back to the contract of purchase and they must ratify the contract as an entirety. If it be contended that they are following their funds and are attempting to recover the land because their funds went into its purchase, as a resulting trust, then, under the doctrine of such trusts, they might have a right to have the land for which their money paid; but in this case the land is not alleged to be in the possession of the person who received the money belonging to them. The guardian did not acquire a title to the land, but under the contract it remained in the original vendor; and while it may be true that the wards had an equitable interest in the land to the extent of the amount of their funds which went toward its purchase, it is a question whether the equity so possessed by them attaches to the land while in the hands of a purchaser at judicial sale, by which sale title, under the terms of the contract, first passed out of the vendor. If the allegations in the petition be true, it is certain that Pendleton could not now convey title to the land. In our ⁴¹⁹ opinion, the wards are not entitled to have a decree vesting in them title to the land on the simple tender to Pendleton of the balance of the purchase money contracted to be paid by the guardian. It is too late, after a sale of the land has been made under a judgment rendered on a note given for the balance of the purchase money under the terms of a contract, to demand of the original vendor of the land that he make a title on payment of the balance of the purchase money originally contracted to be paid. If the wards stand on the contract made by their guardian, they must not only take that part which is

favorable to them, but that other part also which made the land subject to be sold for the balance of the purchase money.

It is a matter of regret that the record does not contain more of the facts. We cannot determine to whom Pendleton conveyed the title to the land, if he ever conveyed it to anyone. We do not know from this record whether, when Pendleton traded the note to Inman, he gave to the latter title so as to comply with the terms of the bond which he had executed to the guardian. These are pregnant questions which, in our view of the case, materially affect the rights of the plaintiffs. We only deal with the case as it is brought to our attention. The plaintiffs, under the statement of facts made in the petition, are not remediless. Certainly, if the stated facts are true, the guardian would be liable to them for the value of their property which he misapplied. Whether this liability extends to those who received it, and to the purchaser of the land, are questions to be governed by facts not shown in the record. But under any view which we take of the case the plaintiffs are not entitled, under the facts alleged in the petition, to a decree for the land; and the court committed no error in sustaining a demurrer to the petition.

Judgment affirmed.

All the justices concurring.

GUARDIAN AND WARD — PERSONAL LIABILITY OF GUARDIAN.—The guardian is personally bound to third persons for all contracts he makes on behalf of his ward. Note to Fessenden v. Jones, 75 Am. Dec. 450. Where one gave a promissory note as guardian to effect the release of his ward from an execution, it was held that he was personally liable for its payment: Forster v. Fuller, 6 Mass. 58; 4 Am. Dec. 87.

GUARDIAN AND WARD—UNAUTHORIZED CONTRACTS—RATIFICATION.—Heirs who, with knowledge, accept the proceeds of an unauthorized sale of their lands, are estopped from disputing the validity of the sale. They cannot retain the purchase money and also recover the land: Wilmore v. Stetler, 137 Ind. 127; 45 Am. St. Rep. 169, and note; Tracy v. Roberts, 88 Me. 310; 51 Am. St. Rep. 394. The assent of a ward to a purchase by a guardian need not be express, but may be implied from circumstances, one of the strongest of which is the failure to take immediate steps, on coming of age, to have the sale set aside, provided the party knew it: Scott v. Freeland, 7 Smedes & M. 409; 45 Am. Dec. 310.

GUARDIAN AND WARD—THIRD PERSONS PURCHASING WARD'S PROPERTY.—A person receiving property of a ward from the guardian will be deemed a trustee for the amount, if he took with notice of the trust: Hill v. McIntire, 39 N. H. 410; 75 Am. Dec. 229; McDuffie v. McIntyre, 11 S. C. 551; 32 Am. Rep. 500.

ROGERS v. BURR.

[105 GEORGIA, 432.]

CORPORATIONS—STOCK SUBSCRIPTIONS—VALIDITY OF GUARANTY—CONSIDERATION.—If a number of persons, in order to induce another to subscribe to the capital stock of a manufacturing corporation in which they are all interested, execute a joint agreement guaranteeing the payment of an annual dividend of eight per cent for three years on such stock to subscribers who take enough stock for the successful organization of the corporation, and also agreeing that if, at the expiration of such three years, the holders of such stock do not desire to carry it any longer, "We hereby agree, with thirty days' notice from any or all of them, to pay each holder par value, or fifty dollars, for each share of stock held by them, their heirs or assigns," such agreement of guaranty is valid and based upon a sufficient consideration, where the guarantors are residents of the town in which the manufacturing corporation is to be located, are interested in its growth and development, and jointly interested with the subscribers in the furtherance of the undertaking.

CORPORATIONS—STOCK SUBSCRIPTIONS—STATUTE OF FRAUDS.—It is not necessary to the validity of a contract of subscription to shares of stock in a manufacturing corporation that it be reduced to writing. Shares of stock in joint stock companies are not within the statute of frauds.

CORPORATIONS—CONTRACT FOR STOCK SUBSCRIPTION—CONSTRUCTION.—A contract made to induce stock subscriptions, whereby the promisors agree to repurchase the stock at the end of three years, upon receiving thirty days' notice that the subscriber desires to return the stock, is conditional, and liability thereunder does not exist in favor of a particular promisee, unless, within a reasonable time after the expiration of the three years, the thirty days' notice is given by him to the promisors of his election to carry the stock no longer.

CORPORATIONS—STOCK SUBSCRIPTIONS—CONSTRUCTION OF CONTRACT.—If several persons, in order to induce a promisee to subscribe for stock, jointly agree to buy such stock back at the end of three years, upon receiving a specified notice from the promisee of his election to sell, notice to one or more joint promisors of an election by the promisee to sell his stock is not notice to the others, and this, though one of them, as agent for the others, has procured stock subscriptions under the contract.

CORPORATIONS—STOCK SUBSCRIPTIONS—CONTRACT OF GUARANTY—CONSTRUCTION.—If joint promisors, to induce stock subscriptions, guarantee the payment of eight per cent dividends to subscribers for three years, and, at the expiration of that time, on receiving a specified notice, to purchase the stock at its par value, the guaranty as to the dividends is unconditional and binding without notice, and covers a period of three years, although the guaranty as to purchasing the stock becomes inoperative for want of notice.

J. S. Boynton, R. L. Berner, and Estes & Jones, for the plaintiffs in error.

J. F. Redding and S. N. Woodward, for the defendant in error.

439 LITTLE, J. There are two main facts on which the parties are at issue, and the right of the plaintiff to recover depends upon the determination of both in her favor, to wit: 1. Did the plaintiff's intestate contract for sixty shares of the capital stock of the Barnesville Manufacturing Company on the faith of a written agreement signed by the defendants, conditioned that the defendants guaranteed to her intestate the payment of an annual dividend amounting to eight per cent on the shares subscribed, and also by which they undertook, after the expiration of three years from the date of the agreement and on thirty days' notice, to pay him the par value of the stock for which he had subscribed; and 2. If the plaintiff's intestate did so subscribe 440 did he or his personal representative so comply with the terms of such agreement as to notice, as would entitle the plaintiff to recover? This case has heretofore been before this court, and is reported in *Rogers v. Burr*, 97 Ga. 10. Construing the contract, this court there held that if the intestate did so subscribe, he or his personal representative had the right, at the expiration of three years from the time stated, to elect whether he would keep the stock, or turn it over to the defendants and require them to pay him par value for such stock. The court further held that such election could not be made until after November 30, 1892, and it was further held that the petition now under consideration set out a good cause of action against the defendants. To determine whether the verdict which is sought to be set aside is unsupported by evidence in the record, it is necessary to ascertain the obligations imposed by the contract on each of the parties thereto, as well as to review such portions of the evidence as bear on the questions presented. The contract upon which the suit was brought was an original undertaking by the makers with such persons as would subscribe for any portion of the balance of the capital stock of the Barnesville Manufacturing Company which remained untaken at the time of the execution of the instrument, that such makers would guarantee to such subscribers the payment of an annual dividend on the amount of stock so taken, equal to eight per cent per annum on the money paid into said company on said stock. So that the obligation of the makers of the contract was to pay to these subscribers annually such a sum as, when added to any dividends which might be declared by the manufacturing company, would equal the amount of eight per cent per annum on the amount which such subscribers had actually paid into the company on the stock for which they sub-

scribed, and this guaranty was to be in force for the term of three years from December 1, 1889. The makers further contracted with the subscribers, that at the expiration of said three years, if the holder or holders of the stock so subscribed should so desire, and did not wish to carry the stock any longer, they would, with thirty days' notice given by any or all of such subscribers, pay to each holder of the stock fifty dollars (being the par value) for every share of stock so subscribed. ⁴⁴¹ So that the stipulations of the agreement bound the makers to pay the subscribers, as dividends on their stock for three years, eight per cent per annum on the money such subscribers had paid for the stock, less such a sum as might be paid by the company as dividends thereon. Also, if, after three years from December 1, 1889, any or all of such subscribers did not desire to hold the stock subscribed for, the makers, after thirty days notice from such of them as did not desire to carry the stock, would pay to such subscribers fifty dollars for each share of such stock, upon a transfer of the same. The theory of the plaintiff's case, as set out in her petition, is that her intestate, H. R. Chambers, in his lifetime, under the terms and conditions of the agreement aforesaid, subscribed to sixty shares of such capital stock, of the aggregate par value of three thousand dollars. The evidence does not show the date at which the alleged subscription was made, nor whether the same was in writing. But the petition alleges that before her intestate had paid for the stock he died, and that R. J. Powell, his administrator, knowing that the intestate had contracted and subscribed for the stock, carried out such contract and paid the subscription therefor and received a certificate. It was, of course, a question of fact to be determined by the jury whether such contract had been entered into by the plaintiff's intestate with the manufacturing company.

1. It was insisted by counsel for plaintiff in error that even if Chambers had contracted for the sixty shares of stock, the plaintiffs in error were not bound, because there was no consideration moving them in the execution of the instrument sued on, and also that the contract of subscription was not in writing, and did not, therefore, become a binding contract of subscription. A reference to the instrument shows that the makers of it were residents of the town in which it was proposed to erect and put in operation a manufacturing plant in which the promisors and promisees were jointly interested, and the subscription to the stock invited to be made was in further-

ance of the undertaking: See 6 Am. & Eng. Ency. of Law, 704; Bryan v. Dyer, 28 Ill. 188. In the opinion of the makers, the establishment of such plant would add to the prosperity of the town, and thus directly to their own. Undoubtedly, such a consideration is sufficient to support ⁴⁴² the undertaking entered into; for a consideration is valid if any benefit accrues to him who makes the promise: Civ. Code, sec. 3657.

2. We also think it is not necessary to the validity of a contract of subscription to the shares of stock in a manufacturing company that such contract should be reduced to writing. Shares of joint stock companies are neither goods, wares, nor merchandise, within the meaning of the statute of frauds: 1 Thompson on Corporations, sec. 1068, and authorities cited in notes 11 and 12 on page 858, and note 1 on page 859. In the same volume, section 1147, this author says: "It is neither necessary that there should be a contract in writing to take and pay for shares, nor an actual receipt of them, or, what is tantamount, a receipt of their symbol, a stock certificate, in order to constitute one a shareholder. It has accordingly been held that one may become a shareholder without signing the stock-book or any agreement to take shares, and that a parol agreement made with the directors of the corporation to take stock can be enforced, when neither the governing statute, nor the charter, requires such contract to be in writing"; and in notes 2 and 3 cases are cited to support the doctrine laid down. The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intention to become a subscriber is manifest, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intention. Formal rules are for the most part disregarded, and, in general, a contract of subscription may be made in any way in which other contracts may be made. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind him and the corporation: 1 Cook on Stock and Stockholders, sec. 52, note 1.

3. In the present case, the plaintiff testified that her intestate entered into a contract with the corporation for sixty shares of its capital stock, in addition to the forty shares theretofore subscribed; and a receipt was introduced in evidence showing the payment by the administrator to the company of the amount due for such stock at its par value. The plaintiff further testi-

fied ⁴⁴³ that such subscription was made to that part of the capital stock which the defendants in error referred to in their written agreement, and that such stock was taken under the terms and on the faith thereof; and we must rule as a matter of law that the consideration shown was sufficient to support the contract, and the evidence that the stock was subscribed under the terms of the instrument sued on was sufficient to authorize the finding by the jury that a valid contract for stock had been made by the intestate under the defendants' agreement. The jury having determined that a subscription to sixty shares of stock had been made by the intestate under the terms of the agreement executed by the defendants, the question then arises, under the evidence, whether the plaintiff had so complied with the other terms of the agreement as to entitle her to recover. As we have seen, the obligation that the plaintiff should receive eight per cent per annum for three years on the money which her intestate, or any other representative of his estate, had paid into the company under the subscription, was absolute, depending on no condition. But the agreement that the makers of the instrument would pay, at the expiration of three years, to the holders of stock subscribed under such agreement, the par value thereof, was conditional. The holders of such stock were under no obligation, at the end of three years, to sell their stock to the defendants for fifty dollars per share, but it was optional with them whether they would do so or not. If any holder so desired and would indicate such desire by notice as stipulated, then the makers agreed to make the purchase. It was therefore necessary in any event, at the expiration of such term, if any holder desired to sell his stock, that notice be given to the makers of the instrument that he elected to exercise his right of option and call on them to purchase the stock. The pregnant clause in the agreement was: "And if, at the expiration of said three years, the holder or holders of said stock desire and wish not to carry the same any longer, we hereby agree, with thirty days' notice from any or all of them, to pay each holder par value of fifty dollars for each share of stock held by them." This contract, therefore, so far as it imposed liability on the defendants to purchase the stock, was, as has been said, conditional; and if a holder desired, ⁴⁴⁴ under its terms, to sell his stock, he was bound to give to the makers of the instrument, within a reasonable time after November 30, 1892 (Rogers v. Burr, 97 Ga. 10), thirty days' notice of the exercise of his option and of his wish to sell them his stock; and until

such notice was given, there was no obligation on the part of the makers to purchase the stock of any holder; and if no such obligation existed until notice was given and no liability to purchase in the absence of such notice, then no right of action accrued to the plaintiff against the defendants to recover the purchase money of the stock until such a notice had been given. The notice required by the contract was a condition precedent to the liability of the defendants to purchase the stock. If, by the express terms of a contract, notice be a condition precedent to performance, or be implied from the nature of the contract, such notice must be averred and proved: 2 Story on Contracts, 5th ed., sec. 1332, and authorities cited in note 1 on page 504. Clark, in his work on Contracts, page 667, says: "A promise may be conditional in the sense that its operation awaits the performance of some act to be done by the promisee. If no time is specified in which the act is to be done, the nonfulfillment of the condition merely suspends and does not discharge the rights of the promisee. Common illustrations of such conditions are furnished by cases of promises conditional upon demand or notice. If a person promises another to do something upon demand, he cannot be sued until demand has been made; or if he promises to do something upon the happening of an event, and stipulates that notice shall be given him of the event having happened, he cannot be sued until such notice has been given." Apply this rule to the contract under consideration. It will be found that no time was specified in which the makers of the instrument obligated themselves to purchase this stock, except that it was not to be done until after three years from a given date. The instrument contained a promise that if it should so happen that the holder desired, after a given time, to sell his stock for a given price, then the defendants agreed to purchase it at that price, upon thirty days' notice of such desire being given to them. It must, therefore, be held that, until such notice was given, the defendants were under no obligation to purchase the stock held by the plaintiff, although it had been taken under the terms of the agreement. Whether or not the notice was given was a question of fact. The plaintiff avers that it was so given. The defendants in their answer deny it. The plaintiff, in her testimony on the subject of notice, says: "I never made any demand of the defendants for the eight per cent interest; nor did I make demand of them to take the stock off of my hands. The only demands that ever were made were made by Mr. Burr, my husband, and they re-

refused. Mr. Burr, for me, demanded that the parties should take the stock. This was done by a demand on Mr. Rogers. I never did make any demand personally. I never did give any personal notice that I wanted them to take the stock and to pay the interest." Burr in his testimony says: "I served each of the defendants on June 5, 1893, with a copy of the notice (written demand). I mailed a copy to each one." So far as the record discloses, this written demand constituted the only notice which was ever given. Some of the defendants admitted having received this notice at a given date. Others of them denied that they had ever received any notice prior to the bringing of the suit. It is fair to treat Mr. Burr, in giving the notice, as the agent of his wife and as acting for her. Of course, such of the defendants as received this written demand before the institution of the suit must be affected with the notice referred to in the agreement as of the date of the receipt thereof, if the same was given within a reasonable time after the expiration of the time when the plaintiff had a right to exercise the option; but can those defendants who deny that they received the written demand be affected with the notice required by the terms of the agreement? It will be noted that while Mr. Burr says he served each of the defendants with a copy of the notice on June 5, 1893, he explains this by saying that he mailed a copy to each one. The notice required by the terms of the contract as fixing a right in the plaintiff to demand of the defendants the purchase of her stock could only be met by showing actual personal notice to the defendants. The notice required is equivalent to demand. If it was a condition precedent to the institution of her suit that thirty days' notice should be given that she ⁴⁴⁶ desired to sell her stock, in order to render the defendants legally liable to purchase it, then such notice must be a demand that the defendants purchase the stock; because it is only on the failure or refusal to so purchase that the right of action accrues. The notice required being actual, it is apparent that the requirement is not met by simply mailing to the address of each of the defendants a statement that she exercised her right of option and demanded that they purchase the stock, where the defendants or any of them deny that they received such notice, unless it be further shown that such written notice was in fact received by them. The evidence is uncontradicted, therefore, that some of the defendants received no notice prior to the bringing of the suit. In our opinion, before the plaintiff could maintain the action and recover against the defendants, on this

branch of the case, it was necessary that the requisite notice should have been given to each of the makers. The contract was a joint obligation; and as to any particular undertaking therein set forth all must be shown to be liable, or none are.

4. In the next place, we do not think that the contention of the defendant in error, that notice to one or more of the defendants was, in law, notice to each and every one of them, because of the fact that they are joint contractors, is sound. We are aware that in the case of *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358, it was held that a payment made by one of two or more joint contractors, within the statute, and before its bar had attached, constituted a new starting point for the statute, and bound all of such joint contractors; and the ruling there made was adhered to in the case of *Tillinghast v. Nourse*, 14 Ga. 641. The principle upon which those cases were decided was, that the same rule applied to joint contractors or joint promisors as did to partners (for which as it now exists see section 3791 of the Civil Code). Such joint contractors or joint promisors were regarded as partners with reference to the particular joint obligation. In the latter of the cases cited above, however, Lumpkin, J., delivering the opinion of the court, after stating that, owing to disqualification, he did not preside in the former case, says: "We know that the correctness of the principle, that the admission of one joint contractor or partner binds the other, has⁴⁴⁷ been frequently doubted and sometimes denied. The doctrine was first laid down by Lord Mansfield in *Whitcomb v. Whiting*, Doug. 652, and it is founded upon the idea that the bar created by the statute rests entirely upon the presumption that the debt has been paid, and that such an acknowledgment or payment removes the presumption and revives the original promise. And the conclusion is, that in this, as in other cases, an acknowledgment by one of many who are jointly concerned is evidence against all, sufficient to remove the presumption of payment." He further says: "But I must say that this principle has not only been questioned in England (*Brandram v. Wharton*, 1 Barn. & Ald. 467), but from the examination by the supreme court of the United States, in *Bell v. Morrison*, 1 Pet. 363, the foundation on which it rests found to be altogether unsatisfactory. In Pennsylvania and some of the other states it has been utterly exploded": Citing *Levy v. Cadet*, 17 Serg. & R. 126; 17 Am. Dec. 650; *Leavitt v. Leavitt*, 4 Me. 161; also cases collected in *Hunt v. Bridgham*, 2 Pick., 2d. ed., 583, note 1. In the case of *Hunter v. Robertson*, 30 Ga. 479, the court, in declin-

ing to extend the principle announced in the cases from 9 Georgia and 14 Georgia, *supra*, so as to prevent the statute of limitations from attaching as against the indorser or surety by reason of a payment on a note made by the principal or maker, said that the correctness of the principle, even as to joint contractors and partners, was gravely doubted by this court, but as the question was no longer open, but an adjudicated one, the principle was adhered to, although a contrary holding would have been the better policy. The court further said, Lyon, J., delivering the opinion: "If the principle is wrong when applied to joint makers—and there is no doubt in my mind but that it is—shall we extend it to an indorser on the same fallacious reason?" We think the true law is enunciated in the case of *Coleman v. Fobes*, 22 Pa. St. 156, 60 Am. Dec. 75, where it was held that partial payment by one of several joint debtors, not partners at the time, was not such an act as justifies an inference of a new promise by the others, so as to remove the bar of the statute of limitations; and that joint debtors, as such, are not agents of each other. In that case, Lowrie, J., delivering the opinion of the court, after commenting upon the case of ⁴⁴⁸ *Whitcomb v. Whiting*, Doug. 652, and charging to it, for the most part, the confusion which exists in the decisions, both in England and in this country, on this subject, says: "It is not true that joint debtors, as such merely, are the agents of each other. Partners are so while the relation continues, and this is part of the law and essence of that relation, but not of that of joint debtors. The distinction is palpable, when it is noticed that a joint contract by persons not partners can have no inception, and cannot be changed in time, amount, subject, form, or substance, without the several act of each of the joint contractors. Their interests are joined only in so far as the contract joins them. Their contract or understanding by which they agree together to enter into the joint liability to the creditor is one thing, and the joint contract with the creditor another thing. Their relations to each other are defined by the former, and their joint relations to their creditor by the latter; and their joint relations in one aspect in no sense define those in the other. Whether, as among themselves, one is to pay all or half or none depends, not upon the contract with the creditor, but on their own arrangement. One alone may be the real debtor, and may be so abundantly able to pay that the others may be said to have no real interest in the matter. And even if they are, as among themselves, equal debtors, there is

no real community of interest, for by enforcing contribution each is made to answer for his true share."

It cannot be seriously contended that, under the evidence, service of a notice to purchase the stock on Rogers was notice to the other promisors. It appears from the evidence that Mr. Rogers procured the makers to execute the agreement which after execution was left with him to procure, under its terms, the desired amount of subscription. His agency could, under this, extend no further than to procure subscribers; when this was done his agency ceased.

What has been said in reference to notice or demand does not apply to the question of recovering the dividends contracted to be paid. That right, so far as it is stipulated in the contract, is absolute: *Rogers v. Burr*, 97 Ga. 14; and if any legal reason exists why the plaintiff is not entitled to recover the amount of the dividends contracted to be paid during the period ~~449~~ of three years, such reason must be founded on causes other than the want of notice.

In the view we take of the law applicable to the case, we are constrained to rule that as some of the defendants in this case were without notice, prior to the bringing of the suit, and therefore no right of action as to them accrued to the plaintiff upon the obligation to purchase the stock in her hands, it must follow that the verdict in her favor, requiring the defendants to pay over to her the par value of this stock, was contrary to law, and should be set aside. As above stated, the contract on which the suit was brought was joint, not several, and was an obligation of the promisors jointly to purchase the stock, and not an undertaking on the part of anyone severally to do so. The action, therefore, was not, as to this particular stipulation, maintainable, unless each and all of the promisors, who were in life and within the jurisdiction of the court, were not only made parties but shown to be liable: *Booher v. Worrill*, 43 Ga. 587; *Graham v. Marks*, 95 Ga. 38. We have shown there could be no recovery against all for a breach of this stipulation, and therefore, because of the joint character of the obligation, there could have been no recovery against any.

Judgment reversed.

All the justices concurring, except Simmons, C. J., disqualified.

CORPORATIONS—STOCK SUBSCRIPTIONS—CONDITIONAL.
A conditional subscription to stock is a continuing offer, which is

final and absolute when accepted, and is not contrary to public policy, for all subscriptions thus ultimately become unconditional and absolute: *Taggart v. Western etc. R. R. Co.*, 24 Md. 563; 89 Am. Dec. 760; See note to *Parker v. Thomas*, 81 Am. Dec. 398. Contra, *Morrow v. Nashville Iron etc. Co.*, 87 Tenn. 262; 10 Am. St. Rep. 658. An agreement exacted by a subscriber to stock of a corporation from the other subscribers, to the effect that if, at the end of one year, he should desire to sell the shares subscribed for, they will purchase the same, and pay the amount paid by him, with interest, is valid and enforceable: *Meyer v. Blair*, 109 N. Y. 600; 4 Am. St. Rep. 500.

CORPORATIONS—STOCK SUBSCRIPTIONS—STATUTE OF FRAUDS.—A subscription for stock in a corporation is not a contract for the sale of goods, wares, or merchandise, and is not within the statute of frauds: *Webb v. Baltimore etc. Ry. Co.*, 77 Md. 92; 39 Am. St. Rep. 396.

HARRISON v. HARRISON.

[105 GEORGIA, 517.]

DEVISE — CONSTRUCTION — COTENANCY.—A will by which land is devised to specified legatees, to have and to hold in common for a home and support so long as they remain together, and should one or more leave they can take such as given them individually in this will, but have no share or control of this that is given in common without the consent and signature of those that remain on the place," with restriction on the right of either to alienate or lease any part of the land without the consent of all, constitutes such legatees cotenants in the lands devised, with a condition subsequent that the whole must be used for the support of such of the legatees as choose to remain on the place.

DEVISE—REJECTION OF CONDITION INCAPABLE OF PERFORMANCE.—A devise of land to specified legatees, "to have and to hold in common for a home and support as long as they remain together, and should one or more leave they can take such as given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place," imposes a condition subsequent that the whole land be used for the support of such legatees as choose to reside thereon, but if such condition becomes incapable of performance, it must be rejected and the devise held to be absolute. Hence, if one of the legatees is forced to remove from the land by the cruel treatment of another, the former is entitled to his share of the estate, and the full and absolute use thereof freed of the condition. He is also entitled to the immediate possession of his share of the estate, and can exercise the right of partition or seek any other remedy afforded to a cotenant.

Evans & Evans and J. A. Harley, for the plaintiff.

R. H. Lewis and J. K. Hines, for the defendants.

518 **LITTLE, J.** Mary J. Harrison filed her petition in the superior court of Washington county, making in brief the fol-

lowing case: In July, 1877, the will of her father, William D. Harrison, was admitted to probate and letters testamentary were issued to William T. Harrison and Seleta L. Harrison. After providing for a number of specific legacies to several of his children, the thirteenth item of the will is in the following language: "That all of my lands and other property, after the above-named bequests have been settled, I give and bequeath to my five children that remain to me, to wit, Seleta L., Emma S., Martha W., Mary J., and William T., to have and to hold in common for a home and support so long as they remain together. Should one or more leave, they can take such as is given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place. No one or more shall sell, lease, rent, or in any way convey to any other than those that remain on the place, without the signature of the five named in this item." The petition alleges that the realty on which item 13 operated consisted of a tract of land lying in Washington county, containing four hundred acres (fully described), and also another tract of land in Johnson county, containing two hundred acres (also fully described), and that the personal property was of the value of fifteen hundred dollars. The petition also sets out as a fact that W. T. Harrison has had the exclusive management and control of the property referred to in item 13 since his qualification as executor in July, 1877, and that he has made no annual returns. It also alleges that W. T. Harrison has received from the property referred to in item 13 the sum of twelve hundred dollars, which he has invested for his own use and benefit, and denies to petitioner the right of participating therein. It also alleges that William T. Harrison, from the rents and profits of the property referred to in item 13, has purchased two tracts of land in Hancock county, and that at the request of W. T. she and her sisters who are named in the thirteenth item, in 1894, empowered said W. T. to sell the Johnson county land, which he did for five hundred dollars, but has not accounted to her for any of the purchase money. It is also alleged that the affairs of the testator have long since been settled and there is no legal obstacle in the way of a final distribution. The petitioner also alleges that she lived on the land named in this item, which was the W. D. Harrison home place, with the said W. T. Harrison and her sisters, Seleta L. and Emma, from the death of her father until July, 1895; that her treatment by her brother, W. T., was so cruel and unpleasant

that she was forced to leave said land and reside with her sister, and that since her removal the defendants have set up an adverse claim to the home place, and pretend that petitioner forfeited her interest in that portion of the land known as the home place by her removal therefrom. The petitioner makes W. T. Harrison and Seleta L. Harrison defendants, and prays that they come to a full and complete accounting of the rents, issues, and profits of the property embraced in the thirteenth item of the will, and the court decree that the defendants pay over to petitioner her share of such rents and profits; and she prays that she have a special lien for said sum on the land lying in Hancock county, purchased by the defendant W. T. with the funds arising from the estate of W. D. Harrison. Petitioner also prays to recover her share of the home place, with reasonable rents since July, 1895.

To this petition the defendants demurred on the following grounds: The petition sets out no cause of action. The petition shows that the petitioner has no interest in the land and other property devised and bequeathed in the thirteenth item of the will. Because Martha W. Duggan and Emma S. Harrison, sisters of the petitioner, named in the thirteenth item, are not made parties defendant. Because petitioner does not set out any definite sum due her by defendants. Because petitioner having assented to the terms of the thirteenth item from the probate of the will until July, 1895, she is now estopped from claiming contrary thereto. The demurrer was sustained and the petition was dismissed. At the September term, 1897, by leave of the court the petition was amended, and at the same term the defendants also by leave of the court amended their demurrer. Petitioner excepted, and assigned as error the ruling of the court in allowing the demurrer to be amended and in sustaining the demurrer to the petition.

1. Questions affecting the construction of this will were before ⁵²⁰ this court in the case of Duggan v. Harrison, 97 Ga. 738. That decision grew out of an application on the part of Martha W. Duggan, one of the legatees named in the will, to bring W. T. and Seleta Harrison, as executors, to a settlement before the ordinary. The decision in that case ruled the following propositions: 1. The executor and executrix, by living upon the land and permitting the other devisees to do so, assented to the legacy in so far as the income was concerned, and all of these parties accepted the legacy to this extent; 2. If Mrs. Duggan was entitled to any of the rents and profits which

accrued during the period of her voluntary absence from the land, her claim is not against the estate, but against the other four as individuals; 3. The case did not involve a ruling on the question as to whether the other legatees were liable to her. On the latter point Mr. Justice Lumpkin, who delivered the opinion of the court, says: "The terms of the will, so far as it relates to this land, are peculiar, and it is quite a difficult matter to determine what is the precise interest of Mrs. Duggan, either in the land itself or in its income during the period whilst she was absent from the premises and the other devisees remained upon, used, and enjoyed the property in common. We are quite certain, however, she has no right to demand of W. T. Harrison and Seleta, in their representative capacity, an accounting as to the income of the land during the time she was absent."

Under the case made here, we are called on to determine the rights of the plaintiff in this land under the terms of the will, as affected by the allegations made in the petition. It will be seen by reference to the petition that the action is brought against the persons named as executor and executrix of the will, but not in their representative capacity. Indeed, while Seleta L. Harrison is made formally a party defendant, no specific prayer for relief is made as against her. As said by Mr. Justice Lumpkin, the language of the thirteenth item of the will is peculiar, and it is difficult to carry into effect the evident intention and wish of the testator, and at the same time preserve to the legatees their absolute legal rights under the instrument. It would seem that some of the language used in making the devise evidences an intention to create an estate in joint tenancy. This estate only ⁵²¹ exists when the tenants have one and the same interest arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession: 2 Blackstone's Commentaries, 180. So far these incidents are present. But the principal incident to an estate in joint tenancy is the right of survivorship, which under no fair construction of this item can be found to be present. However, we will not enter into a discussion to determine whether the will created an estate in joint tenancy, for while we do not think it does, yet if it could be construed to do so, such estates are abolished by our statute and must be held to be tenancies in common: Civ. Code, sec. 3142. By reference to the will as a whole, it will be found that the expressed intention of the testator, as set out in the preamble, was to divide

the property "among my children as equitably as the nature of the case will admit, some having received more than others, and some having been with me longer and some having done more for me than others." Again, in item 2 of the will, the testator directs "that my property and effects be divided among my children in the following order." Coming now to the point of difficulty, the thirteenth item, the words preceding those which fix the character of the estate devised are, "that all of my lands and other property, after the above-named bequests have been settled, I give and bequeath to my five children that remain with me, to wit"; so that it cannot be doubted that it was the intention of the testator to give to each of the children named in the thirteenth item of his will equal shares in the property therein described. It is true that the words used in fixing the estate of each limits the use of the property so devised. Each of said children is "to have and to hold in common for a home and support so long as they remain together. Should one or more leave, they can take such as is given them individually, . . . but have no share or control of this that is given in common, without the consent and signature of those that remain on the place." If it be contended from this language that when one or more of the legatees remove from the place, the removal works a forfeiture of their estate in the land theretofore devised, the reply is, that forfeitures are not favored, and while it is the duty of the courts to give effect to the intention ⁵²² of the testator, a forfeiture will not be decreed unless expressed in plain and unambiguous language. We do not construe this language to work a forfeiture by removal from the place. The property is given to the children "to have and to hold . . . for a home and support so long as they remain together." Suppose all of the children should remove from the land, it would hardly be claimed that the last one to remove took an estate in fee in the whole of the land; and yet such would be the only logical conclusion of the contention that the removal by one from the land forfeited all his interest therein; because when all had removed save one, that one, under the contention, would have the whole land, and title would vest in him, and, as there is no limitation over, the right of disposition would rest in him. As we construe this item, it vests in the five children named equal interests in the land and other property covered by this item, as tenants in common. So long as any of the named children remain on the home place, the rents, issues, and profits of the place are to be used exclu-

sively for the support and maintenance of those who remain. When the place is abandoned by all, the property is relieved from this charge and the devisees are entitled as tenants in common to its control and disposition.

It is not an uncommon thing for devises to be made on a condition requiring residence in some particular place or some particular house. The rule is, that all such conditions are to be reasonably interpreted if possible, or else pronounced void as unreasonable of themselves and obnoxious to public policy. This latter view is tenable where the restraint must so operate as to involve the donee in some breach of permanent duty; as, for example, in compelling married persons to live apart. On this subject it is said in *Schouler on Wills*, second edition, section 604: "Ordinarily, one who is to be supported under a provision in a will is not limited to live in a particular place, especially if there be good reason for leaving it. But a condition that an infant shall live during minority with a suitable person named as sole guide and guardian, may be upheld under most circumstances"; and that "a condition not uncertain or ambiguous happens to be injudicious is an insufficient reason for setting it aside, but all conditions should be justly and reasonably construed." If the ⁵²³ terms of this will are to be so construed as that the condition of residence was required in order for the estate to vest, even then such condition would be liberally construed. In the case of *Fillingham v. Broumley*, *Turn. & R.* 530, Lord Eldon said: "Suppose the devisee had been a member of parliament, and had had a house in London, would you say that he did not live and reside at J.?" "Even should the devisee be required to reside in the house during a defined period, or to make it his principal or usual place of abode, the condition may still be frustrated, for personal presence in a specified place for any part of a day is sufficient residence for that day; and it is not necessary to pass the night of that day there": *Jarman on Wills*, *901; citing *Walcot v. Botfield*, *Kay*, 534; *Wynne v. Fletcher*, 24 *Beav.* 430; *Warner v. Moir*, *L. R.* 25 *Ch. Div.* 605. But, as we have before said, we do not construe the terms of this will as vesting an estate in these children on condition that they live on the place, which is to be forfeited by removal. As we construe its terms, it vests an absolute estate in each of these children, but while any one or more of the five remain on the land the profits arising therefrom shall be devoted to the support of those who so remain. For the testator's intention to qualify reasonably what he chooses to dispose of is not incapable of tak-

ing effect when not contrary to law, and a devise absolute in terms may be modified in effect by other clauses of the will and restrict the gift in accordance with his intentions: Schouler on Wills, secs. 599-602.

It will be noted that the plaintiff alleges she lived on the home place with her brother and sisters from the death of her father until July, 1895, and that her treatment by her brother W. T. was so cruel and unpleasant that she was forced to leave the land and reside elsewhere. If these allegations be true, then such forced removal is not to be counted against her. She had the same right under the will to reside on the land as her brother had, and he as much right as she had, and if the conduct of either toward the other was such as with due regard to personal comfort required one to remove, then it may well be held that the use contemplated by the testator was impossible of performance, and in that event the devisees would be entitled to immediate possession of the estate, divested of the right of use as prescribed in the will. Conditions subsequent are construed beneficially, ⁵²⁴ in order to save, if possible, the vested estate or interest, and if such condition prove illegal or incapable of performance, whether as against good morals or as impossible under any circumstances, or is rendered impossible in a particular case and under existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect: Jarman on Wills, *848-850, Collett v. Collett, 35 Beav. 312; Harvey-Bathurst v. Stanley, L. R. 4 Ch. Div. 272; Conrad v. Long, 33 Mich. 78; 4 Kent's Commentaries, 130. And Professor Schouler, in his work on Wills, says, that "public policy may constitute an element in such cases besides; and as conditions are here construed into conditions subsequent rather than precedent—for conditions precedent are never favored in the construction of wills—the impossible, illegal, or impolitic condition being rejected, the gift stands absolute"; and he further says that "a will, of all writings, deserves the most flexible interpretation which can lay open the mind of its maker": Schouler on Wills, sec. 600.

The testator devised this property in equal interests to his named children, but intended that those of them who chose to do so should reside on the land and receive an equal part of the rents and profits of the property devised. This right vested equally in each of these named children, under the will. If, by disagreement among themselves, it became impossible for the use to continue, if by the conduct of one any other of them

was forced to leave, possessing an equal right with the others, that one could not be legally deprived of the benefit which the testator intended him to enjoy. It will not do to say that the one so compelled to leave would have a right of action to recover his damages against that other for his eviction; because he was entitled to live on that place and have a home there, and the deprivation of this right is contrary to the will of the testator; and that intention being thus impossible of performance, such devisee is entitled then to have the full and absolute use of the estate devised to him. For such right the only method of enforcement is to have his estate free from the condition imposed; and if it is found to be true that the petitioner was subjected to annoyance and bad treatment on the part of one of the other devisees having equal but no more rights than hers, she is entitled to her estate free of the condition. Indeed, we might go further and say ⁵²⁵ that the provision for home and support was intended by the testator to be a reasonable one; and if such could not be afforded from any cause—the unproductiveness of the land, the incapacity of the dwelling-house to afford suitable shelter, or other similar causes—the condition would be held to be impossible of performance and be therefore defeated.

Sufficient averments are made in this case, if proved, to defeat the condition attached to the devise, that is, that the property devised should be used for a home and support for the five children named. In that event the petitioner would have the right to immediate possession of that portion of the estate devised to her, and could exercise the right of partition, or seek any other remedy afforded to a tenant in common. She could not, however, have any partition under the proceeding instituted in this case, if for no other cause than for the want of parties. She, however, alleges in the petition that one of the defendants, W. T. Harrison, has received the sum of five hundred dollars for the sale of the Johnson county land, sold by the consent of all the devisees, and in which she alleges she has a fifth interest. She also alleges that he has received the rents and profits of the home place, in which she has an interest. The allegations in the petition are sufficient to allow it to be held in court, at least to recover such of these items as she is entitled to receive from the defendant; and limited as it may be in this respect, the petition sets forth a legal cause of action to recover such interests, and the court erred in sustaining the demurrer thereto.

Judgment reversed.

All the justices concurring.

DEVISE—COTENANCY.—A devise to several persons equally, and when either dies his share to be divided among the rest, vests the property in the devisees as tenants in common, with cross-remainders between them, and the ultimate limitation to the last survivor. The heirs of the devisees other than of the last survivor acquire no title to the property: *Reber v. Dowling*, 65 Miss. 259; 7 Am. St. Rep. 651; *Simmons v. Hendricks*, 8 Ired. Eq. 85; 55 Am. Dec. 439. For a good statement as to what constitutes cotenancy, see *Metcalf v. Miller*, 96 Mich. 459; 35 Am. St. Rep. 617.

DEVISE.—A DISTURBANCE OF THE ARRANGEMENTS OF A WILL is to be justified only where the testator's schemes prove impracticable, and the interests of all his legatees require a departure from the prescriptions of the will: *Drayton v. Rose*, 7 Rich. Eq. 328; 64 Am. Dec. 731.

GAY v. STATE.

[105 GEORGIA, 599.]

CRIMINAL LAW—ABANDONMENT OF CHILD.—Under a statute providing that "if any father shall willfully and voluntarily abandon his child, leaving it in dependent and destitute condition, he shall be guilty of a misdemeanor, in order to constitute the offense of abandonment, there must be an actual desertion, followed by a refusal to support, and the absence of either of such elements prevents the offense from being made out.

CRIMINAL LAW—ABANDONMENT OF CHILD.—If, after a completed act of desertion, a father has been convicted under a statute making it a misdemeanor for "any father to willfully and voluntarily abandon his child, leaving it in a dependent and destitute condition," there can be no new act of abandonment until a return to the discharge of the parental obligation, and no new offense of abandonment until such a return, followed by another act of desertion, and this although the original abandonment is willfully and voluntarily continued and the child remains dependent and destitute.

T. L. Bishop and G. P. Roberts, for the plaintiff in error.

J. F. O'Neill, solicitor, for the state.

600 **COBB, J.** Alexander Gay was tried in the criminal court of Atlanta upon an accusation charging him with the offense of abandoning his child, leaving her in a dependent and destitute condition. The accused filed pleas of former conviction and not guilty, and the issues thus arising were, by consent, submitted to the decision of the judge without a jury, upon an agreed statement of facts, which was, in substance, as follows: Accused is the husband of Sally Gay. They have one

child, Lillian, born in 1896. Neither has any property from which the child can derive a support. The accused has for some years had good paying employment as a laborer, but he refuses now, and has constantly refused since the begetting of the child, to pay anything to the maintenance or support of either his wife or child. He abandoned his wife and child before the birth of the latter, and has refused to live with the wife or support the child since its birth. The wife has no means of support except her manual labor, and she lives with her father, who is forced to assist her, otherwise the child would be thrown upon the charity of the public. The child was abandoned by the father and "left in a dependent and destitute condition" before its birth. On February 2, 1897, the accused was convicted in the criminal court of Atlanta for the abandonment of his child, which had taken place prior to that date, and he paid the fine which was then imposed upon him. He has never returned to his family, or provided for it or for the child in any way since the abandonment which was the foundation of the conviction above referred to. The court entered judgment refusing to sustain the plea of former conviction, and adjudging the accused guilty of the offense charged in the accusation. To this judgment the accused excepted.

The accusation in the former case, as well as in the present case, was brought under section 114 of the Penal Code. This section had its origin in an act of the general assembly, approved December 13, 1866, which was as follows: "An act to add an additional section to the fourth division, part 4, title 1, of the Penal Code. 4. Section 1. Be it enacted, et cetera, that if ⁶⁰¹ any father shall willfully and voluntarily abandon his child or children, leaving them in a dependent and destitute condition, such father shall be guilty of a misdemeanor, and on conviction thereof shall be punished as for other misdemeanors": Acts 1866, p. 151. In 1879 an act was passed making the wife a competent witness in prosecutions under the act just quoted: Acts 1878-79, p. 66. The original act as thus amended now appears in the Penal Code in the following language: "If any father shall willfully and voluntarily abandon his child, leaving it in a dependent and destitute condition, he shall be guilty of a misdemeanor. The wife shall be a competent witness in such cases to testify for or against her husband." The accused having been convicted and punished under this section, and being a second time placed upon trial for what is claimed to be the same offense, it becomes necessary to determine

whether the word "abandon," in the statute, refers to one completed act of desertion, continuously persisted in, and therefore constituting only one offense, or whether the desertion willfully continued in from day to day constitutes each day a separate act of abandonment. In other words, does the actual desertion of a child by a father under circumstances which would render him liable to punishment under the law constitute the offense; and when this actual desertion is once punished is the law satisfied; or does an actual desertion, once taken place and willfully persisted in, make a separate and distinct case of abandonment for each day it continues? If the former is correct, the accused was improperly convicted in the present case. If the latter position is sound, the judgment of conviction was right. In order to determine this question, it is necessary to ascertain what was meant by the general assembly when they used the word "abandon" in this statute. The word "abandon," in its ordinary sense, means to forsake entirely; to renounce and forsake; to leave with a view never to return; to give over entirely; to forsake or renounce utterly: See Webster's and Standard Dictionaries. When referring to the desertion of a wife by a husband, the word has been defined to mean, "the act of a husband in voluntarily leaving his wife with an intention to forsake her entirely—never to return to her, and never to resume ⁶⁰² his marital duties toward her or to claim his marital rights. Such neglect as either leaves the wife destitute of the common necessities of life, or would leave her destitute but for the charity of others": Anderson's Law Dictionary, 4. The word "abandonment," when referring to the act of one consort in leaving the other, is defined to mean, "the act of a husband or wife who leaves his or her consort willfully, and with an intention of causing perpetual separation": Bouvier's Law Dictionary. And as "the willful departure of the husband or wife from the society of the other and the common home, with an intention never to return or to resume the marital relation": Rapalje & Lawrence's Law Dictionary. In Schouler on Domestic Relations, fifth edition, section 219, it is declared that "abandonment by either spouse consists in leaving the other willfully and with the intention of causing their perpetual separation." In the case of State v. Davis, 70 Mo. 467, where the court had under consideration the meaning of the word "abandon" in a statute which punished a father who should abandon his child or children, and fail, neglect or refuse to maintain and provide for them, Henry, J., in the opinion, says: "Abandon-

ment does not mean a mere temporary absence from home, or temporary neglect of parental duty." In the case of Stanbrough v. Stanbrough, 60 Ind. 275, the court had under consideration a statute which provided for the relief and support of married women when deserted by the husbands, and it became necessary to determine what the word "abandonment" meant when used in such a connection. Niblack, C. J., in the opinion, says: "Abandonment, in the sense in which it is used in the statute under which this proceeding was commenced, may be defined as the act of willfully leaving the wife, with the intention of causing a palpable separation between the parties, and implies an actual desertion of the wife by the husband." In the case of Moore v. Stevenson, 27 Conn. 14, the court had under consideration the meaning of the word "abandon" in a statute which authorized a married woman abandoned by her husband to transact business as a feme sole, and the conclusion was reached that in such a statute the abandonment is complete when the husband "voluntarily left the wife with an intention to forsake her entirely, and never to return to her, and never to resume his marital duties toward ⁶⁰³ her, or to claim his marital rights." Applying to the word "abandon," as found in this statute, the meaning which is to be drawn from the definitions above given, it seems clear that, to constitute the abandonment of a child by a father, there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation, and throw off all obligations growing out of the same; that when the effect of this separation is to leave the child in a dependent and destitute condition, the offense under the statute is complete, and nothing less than this will constitute the offense. The act of desertion and the attempt to throw off all parental obligation are necessary component parts of the offense. The continued refusal to provide for the support of the child after the actual desertion takes place is necessary to complete the offense, but it alone is not an offense under the statute. It follows that if a father desert and forsake his child, and the consequence of such desertion is that the child is left in a dependent and destitute condition, the father becomes amenable to the law, and may be punished for that offense; but persistent refusal to provide for the support of the child will not constitute a new offense, unless it is accompanied by another act of desertion. Applying these principles to the present case, the accused was entitled to a discharge on his plea of former conviction. When he deserted his child before its

birth, and persisted in the refusal to maintain and support it after its birth, the offense of abandonment became complete, the two elements necessary being present. He cannot, however, be again convicted of abandonment, under this statute, until he shall return to the discharge of his parental duties and be guilty of another act of desertion. That such is the case is to be regretted, but the meaning of words contained in the statute requires this ruling. The statute is not a remedial measure in the interest of the child, providing for its maintenance. It is a punitive measure, intended in its enforcement to deter parents from deserting their children and leaving them in the condition described in the statute. While abandonment of a child by a father is a misdemeanor, it is possible for the court to impose such a penalty, when the case is clearly made out, as would have the effect of ⁶⁰⁴ deterring parents from abandoning their children, if it should not have the effect of making the delinquent father return to the discharge of his parental duties.

There is nothing in the decisions of this court bearing directly upon the question here involved. In *McDaniel v. Campbell*, 78 Ga. 188, it was held that an indictment which failed to allege that the abandonment was willful, and that the child was left in a destitute condition, was fatally defective. In *Bennefield v. State*, 80 Ga. 107, it was held that, while a father may have been unable to live in peace with the mother of his children, and compelled by her conduct to separate from her, he was, notwithstanding, under a legal obligation to support the children begotten of her, although on account of the tender years of the children, in order to support them, it was necessary to support the adulterous mother; and where the father had caused his wife and children to be removed to another county, where the children became dependent and destitute, the father was guilty of the crime of abandonment in the latter county. An examination of this case, we think, will show that the act of desertion which was necessary to make out the offense of abandonment under the statute was completed in the latter county, by the father's voluntary removal of the wife and children to that place and leaving them there in such a position that the children became dependent and destitute. While the case of *Jemmerson v. State*, 80 Ga. 111, is not directly in point, the ruling made, and some of the language used by the present chief justice in the opinion, tend to support the conclusion reached in the present case. There the act of desertion took place in the state of Alabama. The wife and child subsequent-

ly came to this state, the child being then in a dependent and destitute condition. It was held that there was no offense against the laws of this state, notwithstanding that the child was then dependent and destitute within its limits, because the act of desertion, which was a necessary part of the offense, was committed beyond the limits of the state. In the opinion we find this language: "Before the state can convict of this offense, two things must affirmatively appear: 1. The willful and voluntary abandonment of a child by its father; 2. The leaving ⁶⁰⁵ of the child in a dependent and destitute condition. It is not only necessary that these two things should affirmatively appear, but it also must appear that they occurred in this state. It appears from the testimony in this case that the abandonment of the children took place in Alabama, five or six years before the finding of this indictment. That is one of the main ingredients of the offense charged; but of that part of the offense the courts of this state had no jurisdiction. And we do not think that the refusal of the father to support the children when notified of their condition by the mother, in this state, subsequent to the abandonment in Alabama, and the removal of the mother to this state, would be such an abandonment as contemplated by the code: Code, sec. 4373. The abandonment is something more than 'leaving them in a dependent and destitute condition.' It means the forsaking and desertion of the children; the refusal of the father to live where they are domiciled, and to perform the duties of a parent to his offspring. If he abandons them in this manner in this state, and leaves them dependent and destitute, the offense is complete." In *Bull v. State*, 80 Ga. 704, it was held, that a father who within this state willfully and voluntarily abandons his child before its birth, and persists in the abandonment afterward, leaving it in a dependent and destitute condition, is guilty of a violation of the section under consideration. In *Crow v. State*, 96 Ga. 297, it was held that when, in the trial of an indictment for the offense of abandonment, the evidence showed that the father had deserted the child before its birth, and notwithstanding such desertion made from time to time suitable provision for its support, and never at any time refused to make adequate provision therefor, a verdict of guilty was unwarranted by the evidence.

Construing the statute in the light of these decisions, it seems to be settled that, to constitute the offense of abandonment, there must be an actual desertion, followed by a refusal to support; and that the absence of either would prevent the offense

from being made out. As, after a completed act of desertion, there cannot be a new act of abandonment until a return to the discharge of the parental obligation, there can be no new offense of abandonment until such a return, followed by ⁶⁰⁰ another act of desertion. The plea of former conviction should have been sustained, and the accused should have been discharged from custody.

Judgment reversed.

All the justices concurring.

CRIMINAL LAW—FAILURE TO PROVIDE FOR CHILD—NEGLECT OF CHILD.—The neglect of a parent to provide for his infant child of tender years is an indictable misdemeanor: *Matter of Ryder*, 11 Paige, 185; 42 Am. Dec. 109. The authoritative head of an asylum for children may be criminally liable for the neglect of a child in the asylum, under a statute providing that "whoever, having the care or custody of any child, shall willfully cause or permit the life of it to be endangered, or the health of it to be injured," et cetera, should be guilty of a misdemeanor: *Cowley v. People*, 83 N. Y. 464; 38 Am. Rep. 464.

MOHRMAN v. STATE.

[105 GEORGIA, 709.]

SOCIAL CLUBS—TIPLING-HOUSE.—Although the selling and drinking of liquor in a social club is merely incidental to the main purposes of the club, it is none the less a tippling-house within the meaning of a statute prohibiting the keeping open on the Sabbath day of houses where liquor is furnished and drank.

SOCIAL CLUBS—TIPLING-HOUSE—LIABILITY OF MANAGER.—The manager of a social club, who is also a member and officer therein, and who exercises general superintendence over a bar therein from which intoxicating liquors are sold, is amenable to a statute prohibiting the keeping open of tippling-houses on Sunday.

SOCIAL CLUBS—TIPLING-HOUSE.—A social club which furnishes intoxicating liquors to its members only, to be drunk by them on the premises where sold, is a tippling-house within the meaning of a statute prohibiting the keeping open of tippling-houses on Sunday.

E. B. Baxter, for the plaintiff in error.

C. H. Cohen, solicitor for the state.

⁷⁰⁹ COBB, J. Mohrman was arraigned in the city court of Richmond county, charged with the offense of keeping open a tippling-house on the Sabbath day. At the trial the following facts were agreed to: "1. The rooms for keeping open which

the defendant was indicted were kept open on the day named in the indictment. 2. Said rooms were used as a rendezvous where the 'Grabemax Social Club' did gather on the Sabbath day named in the indictment, and other days, and drink, from a bar kept in the said rooms, intoxicating liquors. 3. They were kept open with the defendant's knowledge, on the Sabbath day as alleged. 4. Said rooms were rented by 'The Grabemax ⁷¹⁰ Social Club,' which is incorporated, and which is an organization composed of some one hundred citizens of Augusta. All that is in them belongs to said corporation, which pays taxes thereon. The stock of liquors therein is the property of said club, and drinks therefrom were sold to members of said club on the days mentioned in the indictment. The selling of liquor on Sunday [was] only an incident and not the main object of the organization. 5. Defendant is manager of the said club, and receives a salary for his services. He was an employé and officer of the said club, with designated duties, one of which was to see that the bar in the club was properly conducted, and kept open for the use of the members, from which drinks were sold. It was his business to look after the general conduct and running of the club, but he was in no sense, other than the above, the proprietor or owner of said rooms; nor had he any authority or control over them. He acted under orders, and was strictly amenable to the governing board of the said club. His authority to do all that he did do flowed wholly from his employment, and only members are permitted in the said club-rooms on Sunday or any other day." On the above facts the presiding judge, sitting without a jury, found the accused guilty. His motion for a new trial on the general grounds was overruled, and he excepted.

An examination of the statement of facts above quoted will show that the "Grabemax Social Club" was distinguished from an ordinary tippling-house in three particulars: 1. The selling of liquor on Sunday was incidental to, and not the main object of, the organization. 2. The accused was an employé and officer of the club, and not the owner thereof. It was his duty, acting under orders of the governing board of the club, to see that the bar was properly conducted and kept open for the use of the members, and to exercise a general superintendence over the club. 3. "Only members are permitted in the said club-rooms on Sunday or any other day." We are called upon to decide whether these three distinguishing characteristics of this

social organization take it out of that class of liquor-selling establishments commonly denominated "tippling-houses."

1. We are of opinion that the incidental selling of liquors will make a place none the less a tippling-house than if that was the ⁷¹¹ main object of its establishment. The evil intended to be corrected by the statute is the keeping open on the Sabbath day of houses where liquor is furnished and drunk; and it makes no difference, we think, for what purpose the house is being operated, if the fact remains that intoxicating liquors are furnished on the Sabbath day, to be drunk on the premises where they are supplied. It certainly can be no reply to the statute that the persons guilty of keeping open a house where liquors are sold and drunk had some other business in view as the primary object of its operation, and that the selling of such liquors is merely an incident to this object. A person keeping a grocery store, but who kept, as incidental to his grocery business, a bar in one corner of the store, at which his friends were accustomed to gather on the Sabbath day and partake with him of intoxicating drinks, might as well make this plea as the plaintiff in error. The fact that the main purpose of the one was social pleasure, and of the other the realization of profit from his grocery business, can make no difference. In both the selling was merely incidental to, and not the main object of, the business. In the case of *Harris v. People*, 1 Colo. App. 289, the accused was convicted of "keeping open a tippling-house on the Sabbath." It appeared from the evidence that he was a grocer, and kept the usual stock of goods in that line of business, and in addition kept on hand intoxicating liquors. Reed, J., in the opinion, uses this language: "The object of the statute, evidently, was to prevent places where intoxicating liquors were sold from keeping open and pursuing their traffic upon the Sabbath. It requires such places to be closed, and parties cannot evade the law by carrying on two kinds of business in the same room, and claiming that the sale of groceries was the principal, and the sale of liquors only an incident." In *Williams v. State*, 100 Ga. 511, it was held that where a person "in her dwelling-house, sold whisky by retail to different persons, and on each occasion permitted the same, or a portion thereof, to be drunk on the premises," she was guilty of keeping open a tippling-house. The selling of whisky was only incidental to the purpose for which she occupied the house. And yet the fact that it was her dwelling did not shield her: See, also, *Harvey v. State*, 65 Ga. 568. ⁷¹² While furnishing intoxicating drinks

might have been a mere incident to the purposes for which the Grabemax Social Club was established, it does not appear but that its members, or some of them, went to the rooms of the club for the sole purpose of procuring and drinking intoxicants. A person who carries on, in connection with some other employment, a business which is a violation of the law, is just as guilty as he who carries on such business alone.

2. The second point is controlled by the principle announced in the case of *Cochran v. State*, 102 Ga. 631. It was there held that: "Evidence showing that the accused was an officer of a social club, that gaming with cards for money was carried on in a room thereof, that portions of the losses in the games played were appropriated to the use of the club, and that the accused, knowing these facts, collected and received the same for its benefit, was sufficient to warrant a verdict finding him guilty of keeping a gaming-house": See, also, *State v. Mercer*, 32 Iowa, 405.

3. Is a social club which furnishes intoxicating liquors to its members only, to be drunk by them on the premises where sold, a tippling-house within the meaning of section 390 of the Penal Code, which provides that "any person who shall be guilty of open lewdness, or any notorious acts of public indecency, tending to debauch the morals, or of keeping open tippling-houses on the Sabbath day, or Sabbath night, shall be guilty of a misdemeanor"? Keepers of tippling-houses have sought in various ways to evade the effect of this statute, and escape the punishment which it prescribes. Some of the methods resorted to are strikingly unique; and this court has not looked with favor upon violators of this law, and has, in every instance where it could possibly do so, upheld convictions thereunder. It has been held that "it makes no difference as to whether any liquors be sold or not; the offense consists in its being open, not in selling, or offering to sell, or giving it away": *Harvey v. State*, 65 Ga. 568. See, also, *Klug v. State*, 77 Ga. 734; *Monses v. State*, 78 Ga. 110; *Seyden v. State*, 78 Ga. 105. In the case of *Hussey v. State*, 69 Ga. 54, no authoritative ruling was made on the question as to whether a club which ⁷¹³ furnished liquors to its members only was a tippling-house, within the meaning of the statute. True, the court uses this language: "It makes no difference in law whether the place be called a bar-room, or a glee-club resort, or a parlor, or a restaurant; if it be a place where liquor is retailed and tippled on the Sabbath day, with a door to get into it, so kept that anybody can push it open and go in and drink,

the proprietor of it is guilty of keeping open a tippling-house on Sunday. It makes no difference if the drinking be done standing or sitting—at a bar or around a table—it is tippling, and the place where it is done is a tippling-house; and if anybody wishing to drink can have access thereto—if ingress and egress be free to all comers—it is a tippling-house kept open on Sunday.” The court was in that case dealing with a public resort, and in so far as any language in the headnotes or the opinion indicates that any other character of resort would not be a tippling-house, it is, of course, merely obiter. We think, however, that the first part of the language quoted will show that, in the opinion of the court, a house of the character now under consideration would be a tippling-house. In the case of *Minor v. State*, 63 Ga. 318, an organization known as the “Albany Glee Club” was under investigation. Resolutions and by-laws for the government of the club were in evidence. From these it appeared that the main and controlling purpose of the organization was to engage in selling and drinking liquors on the Sabbath day. It was not in a strict sense a public resort, for it was provided that, “no member shall invite an outsider that has not paid his quota to the benefit of the club, without the consent of two-thirds of the members present.” This club was held to be a tippling-house. We can see, however, some difference between the Albany club and the club under consideration in the present case, for the latter club, according to the evidence, was thoroughly exclusive, and under no circumstances could persons other than those enjoying membership therein partake of its benefits. It does not appear, however, from the evidence, that any limitation was put upon its membership.

The object of the general assembly in passing this statute, as was said by Warner, J. in *Hall v. State*, 3 Ga. 18, “was to remove ⁷¹⁴ all temptation to idle and dissolute persons who might be disposed to congregate at such places, and violate the Sabbath by any improper conduct.” It was said in *Sanders v. State*, 74 Ga. 82, that “the purpose of the act was not only to close up such establishments on Sunday, in deference to the finer and better feelings of orderly and well-disposed people, but to remove this incitement to graver and more dangerous violations of the law.”

It is rather difficult to embrace within one comprehensive definition every class of resort which could properly be called a tippling-house. Judge Blacklev, in *Minor v. State*, 63 Ga. 318, says that “it is something easier for an offender to baffle the dic-

tionary than the Penal Code, for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps in a broad, practical way at the substantial transactions of men. The code offers no definition of a tippling-house. It deals with them as establishments too well known to need description, and simply prescribes a penalty for keeping them open on the Sabbath day or Sabbath night." According to Black's Law Dictionary, a tippling-house is "a place where intoxicating drinks are sold in drams of small quantities to be drunk on the premises." Anderson says it is "a place of public resort where spirituous, fermented, or other intoxicating liquors are sold or drunk in small quantities without a license therefor." Also, "a public drinking-house—where intoxicating liquor is either sold by drams to the public, or else given away and imbibed": Anderson's Law Dictionary, "tippling-house." The house under consideration in the present case comes within the letter of the definition first quoted, and within the spirit, at least, of the last: See, also, Black on Intoxicating Liquors, sec. 20. But, as Judge Warner, quoting from Chief Justice Marshall, says in *Hall v. State*, 3 Ga. 18, "although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." And in *Sanders v. State*, 74 Ga. 82, we find the following: "Courts are not very astute in shielding violators of this provision from punishment by resorting to niceties of verbal criticism, such as would be intelligible only to grammarians and fastidious scholars, but would utterly fail to impress less ⁷¹⁵ cultivated minds and tastes, in order to provide for them a way to escape."

Even if a sale is necessary before a place where liquors are furnished can be characterized as a tippling-house, the weight of modern authority seems to be, that such a furnishing as the evidence in the present case discloses is a sale. In the case of *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287, a number of persons organized a club for social and literary purposes, and became duly incorporated. Incidental to the main purpose of the organization, the members, but no other persons, were permitted to purchase from the defendant, its steward, liquors and other articles, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit. It was there held that the furnishing of liquors to the members of the club, under these circumstances, was a sale, in violation of the local option act. In the opinion Chief Justice Smith uses this language: "There can be no question

that in a strict legal sense the transaction described in the verdict is a sale of spirituous liquors. All the elements of an executed contract are present. The corporate body, a legal entity, and the owner of the liquor, through its servant, the defendant, delivers it to the purchaser at his call, and receives a fixed compensation in money therefor. The property in the goods passes and vests in the purchaser, and the money paid is received for and becomes the property of the club. Can there be any doubt that a corporation may make contracts and deal with a corporator, precisely as with a stranger, and valid obligations, capable of enforcement, be thus formed between the parties? And is not this dealing with the prohibited subject directly within the terms of the statute, and does it not open the door to the mischiefs intended to be suppressed? It is not necessary that the vendor should be authorized to sell to any applicant, as an ordinary retailer. He is not allowed to sell to anyone, and the fact that customers must be members of the association does not relieve him from criminal responsibility under the mandatory statute." In the opinion will be found several citations of authority supporting the ruling there made: See, also, *State v. Neis*, 108 N. C. 787. ⁷¹⁶ Substantially the same ruling has been made in New York: *People v. Sinell*, 58 Hun, 607; 12 N. Y. Supp. 40; *People v. Bradley*, 58 Hun, 601; 11 N. Y. Supp. 594. At the conclusion of his opinion in *State v. Essex Club*, 53 N. J. L. 99, Van Syckel, J., says that: "It is wholly immaterial whether the sale is made in open view to all who apply, or in the most secluded place, to which only the trusted few can gain admittance. The penalty of the statute is denounced against the sale without license, whether in public or private. The prohibited act is the sale without license, and, in my opinion, the admitted facts show that such sale was made by the defendant below in contravention of the law": See, also, *Martin v. State*, 59 Ala. 34; *People v. Soule*, 74 Mich. 250; *Kentucky Club v. Louisville*, 92 Ky. 309; *State v. Horacek*, 41 Kan. 87. There are cases which hold that the furnishing of liquors under circumstances similar to those in the present case is not a sale, and we do not attempt to reconcile them. We think, however, that the better view is the one supported by the authorities above cited, the reasoning of which seems to be conclusive.

In this state, a sale is not necessary, as has been shown, to make out the offense of keeping open a tippling-house on the Sabbath. Does the statute, fairly construed, embrace within its

terms a house of the character described in the present case? We think so. The statute intended that all places where persons are accustomed to congregate and drink intoxicating liquors should be closed on the Sabbath day. The fact that liquors are furnished to a hundred designated persons, and no others, makes the place where such liquors are supplied none the less a tippling-house. It is still a place where men congregate for the purpose of drinking intoxicants. There is no limitation placed upon the membership of the club over which the plaintiff in error exercised a general superintendence; it is one hundred now, and next year may be five hundred. It is not unfair to assume that some, at least, of its membership are accustomed to congregate at the club-rooms on the Sabbath day for the sole purpose of procuring intoxicating drinks. To hold that such a place was not a tippling-house would be doing violence to the ⁷¹⁷ statute, and would defeat, in a large measure, the very object for which it was enacted; that is, to prevent persons congregating and imbibing intoxicants on the Sabbath day. It was claimed by counsel for plaintiff in error, in his brief, that the Grabemax Social Club of Augusta was "a respectable place to which the public has not access, in which members of a club owning the resort meet for social ends, and merely drink as an incident of being there." This may be true, but it is nevertheless a tippling-house within the meaning of the statute, and must be closed on the Sabbath day.

Judgment affirmed.

All the justices concurring, except Simmons, C. J., and Lumpkin, P. J., absent.

SOCIAL CLUBS—SALE OF LIQUOR—CRIMINAL LIABILITY.

The question whether or not the furnishing of intoxicating or fermented liquor by a social or literary club to its members constitutes a sale in violation of laws prohibiting sales, or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by the courts. While the cases cannot be reconciled, the current, as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members is a sale, and a violation of the laws of the nature stated: Monographic note to *Barden v. Montana Club*, 24 Am. St. Rep. 35-50, where the cases are collected. The doctrine of the principal case is also sustained by *State v. Lockyear*, 95 N. C. 633; 59 Am. Rep. 287. As holding a contrary doctrine, that a social club is not within the meaning of statutes restraining or regulating the sale of intoxicating liquors, see *Klein v. Livingston Club*, 177 Pa. St. 224; 55 Am. St. Rep. 717; *People v. Adelphi Club*, 149 N. Y. 5; 52 Am. St. Rep. 700; *Columbia*

Club v. McMaster, 35 S. C. 1; 28 Am. St. Rep. 826; Barden v. Montana Club, 10 Mont. 330; 24 Am. St. Rep. 27; Commonwealth v. Pomphret, 137 Mass. 564; 50 Am. Rep. 340. As holding that the officers of a social club are not criminally liable for selling liquors on Sunday in violation of a statute, see Seim v. State, 55 Md. 566; 39 Am. Rep. 419.

WILLIAMS v. STATE.

[105 GEORGIA, 814.]

LARCENY.—HOUSE—WHAT IS.—A structure eight feet high, stationary, inclosed with wire and covered with shingles, and, maintained for the safekeeping of birds and fowls, is a house within the meaning of a statute defining larceny from a house or any building.

C. J. Thornton and A. E. Thornton, for the plaintiff in error.

E. J. Wynn, solicitor for the state.

⁸¹⁴ **LITTLE, J.** An accusation was preferred in the city court of Columbus against the plaintiff in error, charging him with the offense of larceny from the house. The specific details of the charge made are, that on the fifteenth day of August, 1898, Esau Williams, unlawfully and with force and arms, certain pigeons of the value of one dollar, the property of Frank Kirven, in the chicken-house of one R. M. Kirven, feloniously and wrongfully, with intent to steal said pigeons, did take and carry away, et cetera. The defendant entered a plea of not guilty; and at the trial one of the questions was whether or not the pigeons were taken from a house. The prosecutor testified that he had a large number of pigeons in a coop, from which a number were stolen. In describing the coop he testified that it was a chicken-house; that the house was made of wire, and was about eight feet tall, two stories, covered with shingles; that while he called it a coop, it was really a chicken-house; that it was nailed to the fence; it could not be moved about; that the posts that held it were not in the ground, but that the structure was stationary. That is all the testimony that related to the house from which it was alleged that the property was stolen. There was other evidence which tended to show that the plaintiff in error privately took the pigeons from this structure; and when the state closed its testimony the defendant moved the court to order a discharge of the prisoner, upon the ground that ⁸¹⁵ the accusation charged the pigeons to have been stolen from a chicken-house and the proof showed that it was not a chicken-

house, but a chicken-coop; and that the probata did not follow the allegata. The court refused the motion, and the plaintiff in error excepted.

Assuming that the judge has the right to direct a verdict at the close of the evidence introduced by the state, whenever the same is plainly insufficient to sustain a verdict of guilty, then the only question which we are to decide is, whether the evidence establishes the fact that the pigeons were stolen from a house. Section 179 of the Penal Code provides that: "Any person who shall, in any dwelling-house, store, shop, warehouse, or any other building, privately steal any money, or any other thing, under the value of fifty dollars, shall be punished as for a misdemeanor." The language of this section is very broad; and a punishment is not only prescribed for a larceny from the dwelling-house, store, shop, or warehouse, but from any other building. A building is defined to be "an edifice for any use; that which is built, as a dwelling-house, barn, et cetera": Standard Dictionary. The structure from which the pigeons were taken, as shown by the evidence in this case, was about eight feet high, stationary, inclosed with wire and covered with shingles. The fact that it was inclosed with wire instead of other material, in our judgment, makes no difference; and it comes plainly under the definition of a house, as used in our statute.

Speaking for myself, I am not aware of any law in this state which either requires or allows a trial judge, on motion, to order the discharge of the accused during trial and before verdict, for the want of evidence to convict. It is the province of the jury to determine, under instructions from the court, whether the evidence sufficiently shows the guilt of the accused to authorize a conviction. If, for any reason, a conviction is had under insufficient evidence, the person convicted has his remedy under the provisions of law to have such verdict set aside. In the trial of a criminal case, as I understand the law of this state, the weight of the evidence, in the first instance, is to be passed upon by the jury exclusively, and the jury is the tribunal created by law to say whether the accused is or is not guilty of the crime. ²¹⁶ I cannot sanction the practice which has grown up in this state for judges who preside at the trial of criminal cases, in advance of a verdict, to pass upon the evidence in the case. And this without any regard to the practice which obtains in other jurisdictions. Section 5331 of the Civil Code, which authorizes the judge, in certain instances, to direct a verdict, applies exclusively to civil cases, and was codified from the opinion of this

court rendered in the case of *Hooks v. Frick*, 75 Ga. 715; and while I fully recognize the rule there laid down as being the established law of this state, such rule, even in civil cases, ought not to be extended beyond the plain and literal meaning of the words used in the section.

We are all of the opinion that no error was committed by the presiding judge in his ruling; and the judgment is affirmed.

All the justices concurring, except Simmons, C. J., and Lumpkin, P. J., absent.

BURGLARY—BUILDING—WHAT IS.—Under the Wisconsin statute relative to burglary, a building is a structure which has capacity to contain, and is designed for the habitation of, man or animals, or the sheltering of property. It need not be completed, if it is in condition to hold tools or other articles of personal property: *Clark v. State*, 69 Wis. 203; 2 Am. St. Rep. 732. A building may be within the statutory definition, although when the statute was passed no such building was known: Monographic note to *People v. Richards*, 2 Am. St. Rep. 391.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WALKER v. WARNER.

[179 ILLINOIS, 16.]

MORTGAGES — FORECLOSURE — REDEMPTION BY GRANTEE OF MORTGAGOR.—By foreclosure of a mortgage, sale of the premises, and master's deed thereunder, the legal title becomes vested in the grantee, leaving nothing in the mortgagor or his grantee to whom he has conveyed before the commencement of the foreclosure proceeding, but to which the latter is not made a party, except the right of redemption, which must be asserted in a court of equity.

MORTGAGES — FORECLOSURE — REDEMPTION — LACHES.—Whether an equitable right to redeem from a foreclosure sale has been lost by laches must be determined with reference to the date of the amended petition praying redemption, when the original petition seeks to establish a fee simple title in the complainant.

MORTGAGES — FORECLOSURE — REDEMPTION — LACHES.—An equitable right to redeem from a foreclosure sale may be lost by laches unless asserted within a reasonable time, and before the situation of the parties has changed, and the rights of others have intervened, or improvements have been made.

MORTGAGES — FORECLOSURE — REDEMPTION — LACHES—LIMITATIONS.—In determining whether there has been laches in exercising a right of redemption from a mortgage foreclosure, a court of equity is not necessarily controlled by the period of limitations as fixed in actions at law. A delay for a much less time than that prescribed by the statute of limitations may, according to the circumstances of the case, be held to be laches, and a bar to the right of redemption.

MORTGAGES—FORECLOSURE—REDEMPTION—LACHES.—An equity of redemption from a mortgage foreclosure cannot be enforced when all parties have supposed that the foreclosure was good, and the holder of the equity of redemption has abandoned the premises and all claim to them, never paying any taxes or offering to redeem, until after a series of years, when the property had passed through many hands and had become valuable.

MORTGAGES—PAYMENTS—LIMITATIONS.—The effect of payments upon a mortgage debt must be determined by the statute in force at the time they were made, with reference to the tolling of the statute of limitations, although the mortgage was executed prior to such time.

Wilson, Moore & McIlvaine, for the appellant.

L. F. English, C. V. Gwin, J. Fentress, R. Dunlap, and E. D. Kenna, for the appellees.

22 MAGRUDER, J. The original petition in this case alleges that appellant is the owner in fee simple of the premises claimed by him, and asks that his title as such owner be established and confirmed. The amended petition is so framed as to be a bill to redeem from the foreclosure sale. The prayer of the amended petition is, that if the purchaser at the foreclosure sale, or his assigns, have any lien or charge upon said premises, the amount thereof may be ascertained, and appellant may be permitted to pay the same.

Samuel J. Walker was the mortgagor, who executed the Stewart mortgage. On August 27, 1873, he sold and conveyed a part of the premises subject to that mortgage to George J. Sherman. When the Stewart mortgage was foreclosed, Samuel J. Walker, the mortgagor, was made a party defendant, but his grantee, Sherman, was not made a party defendant. Sherman acquired his interest by deed from Walker more than five years before the foreclosure proceeding was begun, the foreclosure bill having been filed on January 6, 1879.

23 It is contended by the appellant that, as Sherman was not made a party to the foreclosure proceeding, the sale thereunder was utterly void as to him, and as to appellant, his grantee. Appellant does not allege in his petition that either Samuel J. Walker, or Sherman, or he himself, paid the Stewart mortgage or any part thereof, or that he or Sherman has offered to redeem from the sale under the Stewart mortgage, but insists that the purchaser at the foreclosure sale acquired only a right of subrogation, which right has been barred by the statute of limitations; and that, by reason of such bar and also by reason of the alleged satisfaction of the Stewart mortgage by the foreclosure sale, appellant's title has ripened into an absolute fee simple title. Undoubtedly, Sherman, as the grantee of the equity of redemption, should have been made a party to the foreclosure suit. His rights could not be cut off by that proceeding, unless he was made a party thereto. But the decree of foreclosure was

not, for that reason, a void decree. Sherman was still the owner of the equity of redemption. As the court obtained no jurisdiction over him in the foreclosure suit, his rights remained unaffected by it. The right, however, which thus remained unaffected, was simply a right to redeem: *Cutter v. Jones*, 52 Ill. 84; 2 *Jones on Mortgages*, 5th ed., sec. 1048.

Samuel J. Walker could invest his grantee, Sherman, with no greater title than he himself possessed. The purchaser of the mortgaged premises from the mortgagor stands in the shoes of the mortgagor, and is charged with notice of the mortgage and its legal effect. He merely succeeds to the rights of the mortgagor. The failure to make him a party to the proceeding to foreclose the mortgage does not affect the validity of the decree, but simply leaves his right of redemption unimpaired. The original mortgagor, Samuel J. Walker, was a party to the foreclosure decree, and, as there is no claim that the sale was not fair and regular, the purchaser at the sale and his ²⁴ grantees should be protected. The purchaser at the sale under the decree of foreclosure takes the interests of the defendants, and also of the mortgagee, divested of any equity of redemption on the part of all persons who are parties. Although the grantee of the mortgagor, who is not a party, is not affected, yet his interest, which remains the same, is only a right to redeem. By the foreclosure and sale and the master's deed thereunder, the legal title becomes vested in the grantee in such deed, and leaves nothing in the mortgagor, or his grantees, who are not parties to the proceeding, except the right to redeem in equity. Inasmuch as the interest of the grantee of the mortgagor, who is not made a party to the foreclosure, is merely a right of redemption, the right which he has is an equitable one, and must be asserted in a court of equity. The views thus expressed are sustained by the following authorities: *Carroll v. Ballance*, 26 Ill. 9; 79 Am. Dec. 354; *Oldham v. Pfleger*, 84 Ill. 102; *Taylor v. Adams*, 115 Ill. 570; *Rose v. Walk*, 149 Ill. 60; *Cutter v. Jones*, 52 Ill. 84; *Kelgour v. Wood*, 64 Ill. 345; *Kenyon v. Shreck*, 52 Ill. 382; *West v. Reed*, 55 Ill. 242; *Seaman v. Bisbee*, 163 Ill. 91; *Barrett v. Hinckley*, 124 Ill. 32; 7 Am. St. Rep. 331; *Mulvey v. Gibbons*, 87 Ill. 367; *Bryan v. Kales*, 162 U. S. 411; *Bryan v. Brasius*, 162 U. S. 415.

By the foreclosure sale to McCoy, and the execution of the master's deed to Steele, who obtained the certificate of sale from McCoy by assignment, the legal title passed to Steele, subject

only to a right of redemption in Sherman, who was not made a party to the foreclosure proceeding.

Inasmuch as the only right which Sherman had after the foreclosure sale was a right of redemption, the question arises whether or not that right was barred or lost when the amended and engrossed petition was filed in this case on May 8, 1897. It is a difficult question to determine, and is left in much uncertainty by the authorities, as to when an equitable right of redemption is barred, especially where the redemption is to be made from a mortgage, or a sale under the foreclosure thereof, where ²⁵ the claimant of the right of redemption has not been made a party to the proceeding. In determining whether, in this case, the right has been barred the time of filing the amended petition, to wit, May 8, 1897, and not the time of filing the original petition, to wit, May 21, 1896, is to be taken into consideration. The original petition was not a bill to redeem, but a bill to establish title. There was no prayer asking for the exercise of the right of redemption, until the filing of the amended petition. The appellant abandoned the case made by his original bill or petition, and made a new and different case by way of amendment, thus making use of the privilege of amending, in order to make an entirely new bill: *Shields v. Barrow*, 17 How. 130. As, therefore, the amendment to the original petition transformed it into a bill to redeem, we must regard the date of the filing of the amended petition as the date when the prayer for the exercise of the right of redemption was first made. Whatever may be the period of time within which the appellant ought to have exercised his right of redemption, that period must be calculated with reference to the date of filing the amended petition.

The right of redemption being a purely equitable estate, a court of chancery will not protect and enforce it unless equitable considerations require it to do so. As the right is the creation of a court of chancery, it can only be asserted in such court when its assertion is plainly equitable: *West v. Reed*, 55 Ill. 242; *Kenyon v. Shreck*, 52 Ill. 382. It may, therefore, be lost, unless it is asserted within a reasonable time, and before the situation of the parties has changed, and the rights of others have intervened, or improvements have been made. In other words, the right may be lost by laches. In the recent case of *McDearmon v. Burnham*, 158 Ill. 55, 62, we said: "When a court of equity is asked to lend its aid in the enforcement of a demand that has become stale, there must be some cogent and

weighty reasons presented why it has been permitted ²⁶ to become so. Good faith, conscience, and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity. In the absence of these elements, the court remains passive, and declines to extend its relief or aid."

In determining whether there has been laches in the matter of exercising a right of redemption, a court of equity is not necessarily controlled by the period of limitation as fixed in actions at law. A delay for a much less period than that prescribed by the statute of limitations will, according to the circumstances of the case, be held to be laches and a bar to the right of redemption: *Williams v. Rhodes*, 81 Ill. 571. Where there has been a defective foreclosure, the equity of redemption will not be permitted to be asserted against a superior equity, or an equity still stronger: *Mulvey v. Gibbons*, 87 Ill. 367.

In the present case, the debt secured by the mortgage to Stewart was due on December 1, 1866. When the present bill to redeem was filed on May 8, 1897, more than thirty years had elapsed since the maturity of the debt secured by the Stewart mortgage. More than twenty-three years had elapsed since the last partial payment on September 30, 1873, had been made upon that mortgage. More than eighteen years had elapsed since the proceeding to foreclose the mortgage was instituted, to wit, January 6, 1879; nearly sixteen years had elapsed since the decree of foreclosure was entered on December 12, 1881. Sherman obtained his deed from Samuel J. Walker on August 27, 1873. He held the title for twenty years until August 18, 1893, when he made a deed to the present appellant. Sherman was affected with notice of the existence of the mortgage when he obtained his deed from Walker. For a period of twenty years he held the title without making any payment whatever upon the mortgage debt. The appellant waited nearly four years after obtaining his deed from Sherman before he filed this petition or bill to redeem. When the bill was filed ²⁷ more than fifteen years had elapsed since the property was sold under the foreclosure decree by the master in chancery on January 28, 1882. The master's deed to Steele was executed on April 9, 1887, and more than ten years had elapsed after that date before the filing of the bill to redeem. Neither Sherman, nor the appellant, paid any taxes upon the land after January 6, 1879, when the bill to foreclose was filed, nor, so far as appears, did Sherman pay any taxes prior to the filing of the bill to foreclose. In the meantime, Nelson A. Steele, who obtained the

master's deed, had parted with his interest to the appellees herein. The appellees, who are railroad companies, had acquired a right of way through the property in question, and laid down their tracks about six years before the present bill was filed. The failure of the appellant and his grantor, Sherman, to pay taxes or make any payments upon the mortgage would indicate an abandonment of the property on their part. Under these circumstances it would be inequitable to allow a redemption. The equity of redemption cannot be enforced where there has been an attempted foreclosure, and all parties have supposed that the foreclosure was good, and the holder of the equity of redemption has abandoned the premises and all claim to them, never paying any taxes or offering to redeem until after a series of years, when the property has passed through many hands for full value, and has become valuable: *Mulvey v. Gibbons*, 87 Ill. 367.

In some cases, it is said that the right to redeem and the right to foreclose are mutual and reciprocal, and that when the one is barred the other is barred. This proposition, rightly understood, only means that, if the instrument be a mortgage with one party, it must be a mortgage with both; that it cannot be a mortgage on one side only, but must be a mortgage with both parties: *Bradley v. Norris*, 63 Minn. 156; *Locke v. Caldwell*, 91 Ill. 417; *Jackson v. Lynch*, 129 Ill. 72; *Green v. Capps*, 142 Ill. 286. So long as the relation of mortgagee and mortgagor exists the right²⁸ of redemption exists. It seems to be assumed by counsel for appellant that, as the appellees succeeded to the rights of the mortgagees by reason of holding under the purchaser at the foreclosure sale, the relation of the appellees, as such mortgagees, to the appellant, as mortgagor, or as holding under the mortgagor, continued to exist by reason of the fact that appellees took possession of the property in 1891, a little more than five years before the filing of the amended petition. It is true that, after condition broken, the mortgagee has two methods of enforcing the security for the debt; one of these methods is by bill in equity for the sale of the mortgaged property; the other is by entry and possession of the property by the mortgagee and the application by him of the rents and profits to the payment of the debt and interest. When the mortgagee enters and takes possession after condition broken, and before the debt is paid for the purpose of enforcing his security, the relation of mortgagee and mortgagor continues to exist and the mortgagee occupies a position of trust with

reference to the mortgagor. But in the present case, possession was not taken by the purchaser at the foreclosure sale, or any of his grantees, until the proceeding by foreclosure had been completed, and a sale had been made and a master's deed had been executed. The initiation of the foreclosure proceedings may have operated to acknowledge the outstanding right of redemption at that time, but the culmination of the proceedings and the deed of the master must be recognized as evidence of the assertion, on the part of the mortgagee or the purchasers at the sale, of an extinguishment of the equity of redemption: *Harter v. Twohig*, 158 U. S. 448. The possession taken in 1891 was not under the mortgage, but was adverse to the rights of the mortgagor and his grantees. Such possession was taken in assertion of the rights of the purchaser and his grantees, as acquired by virtue of the mortgage sale and the master's deed. Even if the ²⁰ limitation upon the right to redeem be regarded by analogy as the same as the statutory limitation on foreclosure by suit, here the master's deed, executed on April 9, 1887, to Steele was so executed more than ten years before the present bill to redeem was filed. Under the limitation law, suits to foreclose mortgages are barred within ten years after the right of action, or the right to make sale, accrues. The amended petition may be fairly construed to allege that a payment was made upon the Steele mortgage as late as September 30, 1873. This payment was made after the limitation law of 1872 went into force. Hence, the payment of September 30, 1873, relied upon as constituting a new promise and as reviving the debt, revived the debt for a period only of ten years from that date: *Drury v. Henderson*, 143 Ill. 315. Although this mortgage was executed when the statute of limitations of 1849, barring the debt in sixteen years, was in force, yet, inasmuch as a payment was made after the act of 1872 went into force, that act governed as to the time of the extension created by the payment. It follows that, even if Sherman or the appellant was entitled to redeem from the mortgage sale for ten years after the execution of the master's deed, ten years had expired before the amended bill or petition in this case was filed.

One of the counsel has suggested another view of the matter, and that is, that under section 15 of the limitation law of 1872, "all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued." It is urged that a proceeding to enforce the right of redemption is a civil action, and should, therefore, be commenced within five

years after the right to redeem has accrued. If this view be adopted, the five years had elapsed after the taking out of the master's deed on April 9, 1887, before May 8, 1897, the time of the filing of the present bill or petition.

It is apparent, therefore, that whether we apply to the facts of this case the doctrine of laches as enforced in ³⁰ equity—which does not fix any particular period for the termination of the right of redemption, but leaves it to depend upon the equitable circumstances developed in each case—or the doctrine that the limitation of the right to redeem in equity must be governed, by analogy, by the statute of limitations, as enforced in actions at law, or as applied to the right of foreclosure, in either view, the appellant's right of redemption was gone when the amended bill or petition was filed.

We are, therefore, of the opinion that the court below committed no error in sustaining the demurrer to the petition filed by the appellant. Accordingly, the decree of the circuit court, dismissing the petition, is affirmed.

MR. JUSTICE BOGGS dissented and said: "I do not concur in the view a decree of foreclosure, sale, and master's deed thereunder leave nothing in the grantee of the mortgagor holding under a recorded deed, who was not a party to the foreclosure proceeding, except a right to redeem in equity. Such a grantee, by the conveyance from the mortgagor, became vested with the title to the mortgaged land subject to the lien of the mortgage. His right and title are in nowise affected by a decree in a proceeding to which he was not a party: *Ohling v. Luitjens*, 32 Ill. 23; *Dunlap v. Wilson*, 32 Ill. 517; 9 *Ency. of Pl. & Pr.* 305. Prior to the filing of a bill to foreclose a mortgage the grantee of the mortgagor might discharge the mortgage lien by making payment of the principal and interest of the mortgage debt. The rendition of a decree to which he is not a party has no efficacy to deprive him of that right."

MORTGAGES—FORECLOSURE—EFFECT ON TITLE.—A foreclosure sale divests the title of all the parties to the suit, and hence the mortgagor plaintiff therein cannot assert against the purchaser tax titles held by him prior to such sale: *Ames v. Storer*, 98 Wis. 372; 67 Am. St. Rep. 813. Upon a foreclosure sale, the purchaser takes the title of the mortgagor as of the time when the mortgage lien was created: *Batterman v. Albright*, 122 N. Y. 484; 19 Am. St. Rep. 510. See, also, *Norris v. Ile*, 152 Ill. 190; 43 Am. St. Rep. 233; *Hokanson v. Gunderson*, 54 Minn. 499; 40 Am. St. Rep. 354.

MORTGAGES—FORECLOSURE—REDEMPTION—LIMITATIONS.—The equity of redemption is a creature of the courts of chancery, and is impliedly reserved by the mortgagor. This reserved estate belongs to the mortgagor, is regarded as an estate distinct from the right vested in the mortgagee, and is indefinite in its duration: *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257;

Youle v. Richards, 1 N. J. Eq. 534; 23 Am. Dec. 722. The time within which the right to redeem must be exercised may be regulated by statute, and in such a case the statutory time is conclusive: *Whitney v. Higgins*, 10 Cal. 547; 70 Am. Dec. 748; *Cunningham v. Hawkins*, 24 Cal. 403; 85 Am. Dec. 73.

MORTGAGES—LIMITATIONS—EFFECT OF PAYMENT.—The bar of limitations does not attach to a mortgage paid in part until the statutory period has run from such payment: *Stump v. Henry*, 6 Md. 201; 61 Am. Dec. 300.

ILLINOIS CENTRAL RAILROAD COMPANY v. KING.

[179 ILLINOIS, 91.]

RAILROAD COMPANIES—DUTY TO TRESPASSERS.—A person stealing a ride on a railroad train is a trespasser and gains no rights; but it is the duty of the railroad company and its employes not to injure him willfully or intentionally.

RAILROAD COMPANIES—DUTY TO TRESPASSERS—EVIDENCE OF WILFULNESS.—Evidence that a brakeman pulled a person who was stealing a ride on a railroad train from under the train while it was in motion, and manifested his feeling and willingness to inflict needless injury by cursing him and throwing a stone at him, is evidence that the act of the brakeman was willful.

RAILROAD COMPANIES—DUTY TO TRESPASSERS—LIABILITY FOR ACT OF BRAKEMAN.—A railroad company is liable for the willful act of its brakeman within the scope of his authority in putting a trespasser off its train.

RAILROAD COMPANIES—LIABILITY FOR WILLFUL INJURY TO TRESPASSER.—The negligence of a trespasser in taking a position under the cars to steal a ride upon a train is not an issue in an action to recover for injury received while he was being dragged from such position by the willful act of a brakeman while the train was in motion.

NEGLIGENCE.—ALTHOUGH A PERSON IS BOUND TO USE ORDINARY CARE to protect himself against the known dangers of his situation, he need not exercise care to protect himself against an intentional injury by another of which he has no notice.

TRIAL—ERRONEOUS INSTRUCTIONS.—It is not ground for reversal of a judgment that an instruction assumes as proven a fact established by the evidence without contradiction.

W. H. Green and J. Fentress, for the appellant.

Vernor & Carson and J. A. Watts, for appellee.

92 CARTWRIGHT, J. On September 7, 1897, appellee, a colored boy thirteen years old, was stealing a ride on a freight train of appellant running south from Ashley, Illinois. His home was in Jackson, Mississippi, and he was making his way to said place in that way. He got under the car between the

box and the running gear and laid down on the iron rods which run lengthwise under the car, and was nearly midway between the ends of the car. After the train started a brakeman climbed down from the side of the car further forward, and as the train was running six or eight miles an hour he ran along by the side of the car where appellee was, cursing him, and reached under the car and caught appellee by the coat collar and pulled him out and threw a stone at him. In doing the act, the right foot of appellee was run over and crushed so that it had to be amputated, and he brought this suit to recover damages for his injury. In the first and third counts of his declaration he alleged that the servant of defendant wantonly, maliciously, and willfully threw him from the train to the ground, and in the second charged that while he was on the train, with the knowledge and consent of servants of the defendant, they forcibly pushed and pulled him from the train of cars to the ground. The general issue was pleaded, and there was a trial, which resulted in a verdict for two thousand dollars, upon which judgment was entered. The appellate court affirmed the judgment.

At the conclusion of the evidence the defendant asked the court to instruct the jury to return a verdict of not guilty, and it is argued that this instruction should have ⁹³ been given because there was a want of evidence tending to prove these essential facts: 1. That the act of the brakeman was willful; 2. That it was within the scope of the duties intrusted to him by defendant, so as to make defendant liable for his act. It is further contended the negligence of plaintiff was the proximate cause of the injury.

The liability of defendant to plaintiff for his injury is not founded upon any duty or obligation imposed by law arising out of the relations of the parties. Duties may arise from contracts or from relative situations in which parties are brought where they have relative rights, and here there was no right or corresponding duty arising out of such relation. Plaintiff was a trespasser, and defendant owed him no duty other than such as it owed to any stranger. But although he was a trespasser he did not forfeit the right which inheres in every person as against every other person, in all conditions, that defendant should not willfully and intentionally inflict an injury upon him. The violation of the corresponding duty not to inflict a willful or intentional injury is usually punished as a public wrong, and the person injured may also recover for the private

injury. Although plaintiff gained no right by being upon defendant's train as trespasser, and was wrongfully there, it was the duty of defendant not to injure him willfully or intentionally: *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112.

There was evidence tending to prove that the act of the brakeman was willful. He pulled the plaintiff from under the cars when the train was running at a speed of six or eight miles an hour, and manifested his feeling and willingness to inflict a needless injury upon plaintiff by cursing him and throwing a stone at him.

The liability of defendant rests upon the further question whether the act of the brakeman was in the course of his employment and authority as a servant of the defendant. If he was acting within the scope of his duty⁹⁴ and employment, the defendant would be liable for his act, although willful and malicious: *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485; 42 Am. Rep. 29. There was no want of evidence to show that the brakeman did the act within the scope of his duty. He testified as follows: "Our instructions are to stop and put them off if we find someone beating their way. . . . No, sir; when you put a man off the train you do not mean that you jerk him off—kick him off. It means that when we find a man on the train we instruct him that he can't ride, and he gets off. That is as far as our directions run as brakeman." This evidence shows conclusively that it was within the scope of his directions and duties to put trespassers off the train.

The other question, whether plaintiff was negligent, was not relevant to the inquiry. If he had been injured in consequence of the very dangerous position in which he placed himself, his negligence would have barred a recovery. But his injury was not in consequence of the dangers of his position on the rods, but because of the willful act of the brakeman in pulling him off while the train was running. A person is bound to use ordinary care to protect himself against the known dangers of his situation, but the law does not exact of him the exercise of care to protect himself against an intentional injury by another of which he has no notice. No one is bound to anticipate and guard against a willful and intentional wrong such as was committed in this case. The motion for the peremptory instruction was properly denied.

The remaining complaint made is, that the court gave to the jury the first instruction asked by the plaintiff, as follows: "The

court instructs you that if you believe, from the evidence, that the injury complained of was wantonly and willfully inflicted, as charged in the declaration, then the plaintiff will be entitled to recover, although you may believe, from the evidence, that plaintiff was guilty of some negligence."

⁹⁵ This instruction is objected to because it purported to state to the jury the conditions under which plaintiff would be entitled to recover and under which they should return a verdict for him, and omitted the requirement of proof that the brakeman was acting within the line of his duty or within the scope of his employment. The law cannot assume, at least as to a subordinate employé on a train who is not intrusted with the general management and control of it, that he has control over passengers or persons attempting to ride, or that he is intrusted by his employer with authority in respect to them or to eject them, and it was necessary to make the proof: 3 Elliott on Railroads, sec. 1255; Farber v. Missouri Pac. R. R. Co., 116 Mo. 81; Corcoran v. Concord etc. R. R. Co., 56 Fed. Rep. 1014. The requirement of such proof was omitted from the statement of what would entitle the plaintiff to recover in the instruction. There were instructions given on the part of defendant which stated the correct rule, but they did not serve to cure admissions in this instruction, which purported to contain all the elements necessary to a recovery. In such a case, the jury may follow either instruction, and if they find all the facts proved which are recited in an instruction purporting to give all the grounds of a recovery, they would be bound to return a verdict according to its directions without proof of the omitted fact. The instruction referred the jury to the declaration, which is said to be specific enough to obviate this objection. We have not held it error to refer to the declaration by an instruction which requires proof of all its allegations, and the practice of making such reference is, perhaps, not infrequent, but it is not to be commended. In Thompson on Trials, section 1027, the learned author, in defining the province of the court and jury, says: "The construction of the pleadings is, of course, always a question for the court. . . . It is, therefore, the duty of the court to state the issues to the jury, without referring them to the pleadings to ⁹⁶ascertain what the issues are. . . . It is error to leave the jury to construe and determine the effect of the pleadings." Again, in discussing the requirements of the law respecting instructions, he says (section 2314): "It is the duty of the court to determine what are the issues, and to state

them to the jury, and it is error to refer them to the pleadings to determine the issues, in whole or in part." Again (section 2582): "Properly, the jury have nothing to do with the pleadings, and argument directed to the pleadings is addressed to the court. . . . The pleadings are often drawn in technical language, which might not be correctly understood by persons unlearned in the law." In 11 Encyclopedia of Pleading and Practice, 154, it is said: "The clear weight of authority is, that it is the province and duty of the court to state specifically to the jury what issues are raised by the pleadings, and that it is erroneous to refer to the pleadings to ascertain what the issues were; that the construction of the pleadings and the issues raised thereby are questions for the court alone, and not for the jury."

It is a proper office of an instruction to explain the issues and to state to the jury the facts from which a conclusion of law is to be drawn, and that is undoubtedly the better practice. But the reference here to the declaration could not supply the defects, both because there is no averment in the declaration that the brakeman was acting within the scope of his employment or duty or had authority to do the act, and also because the reference embraces nothing except the willful and wanton character of the act. All that it would be necessary for the jury to find would be that the injury was wanton and willful, as the declaration alleged it to have been. The defect in the instruction was not cured in any way, but we do not think the judgment should be reversed on account of it, because defendant was not prejudiced by the omission. The brakeman testified as to his authority and directions, and there was no contradictory evidence. It is not ground ⁹⁷ for reversal than an instruction assumes as proven a fact conclusively established by the evidence without contradiction: *Gerke v. Fancher*, 158 Ill. 375; 11 Ency. of Pl. & Pr. 132.

The judgment of the appellate court is affirmed.

RAILROAD COMPANIES—DUTY TO TRESPASSERS.—A railroad company is not answerable to a trespasser on a train for negligence, and owes him no duty other than that of doing him no wanton or willful injury: *Richmond etc. R. R. Co. v. Burnsed*, 70 Miss. 437; 35 Am. St. Rep. 656, and note; *Chicago etc. R. R. Co. v. Mehlisack*, 131 Ill. 61; 19 Am. St. Rep. 17, and note. Duty of a railroad company toward trespassers upon the track of a railroad: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596; 32 Am. St. Rep. 218; *Central R. R. etc. Co. v. Vaughan*, 93 Ala. 209; 30 Am. St. Rep. 50, and extended note thereto.

RAILROAD COMPANIES—DUTY TO TRESPASSERS—WILLFUL ACT OF SERVANT.—A railroad company is liable for the willful wrong of its employes in expelling a trespasser from its freight train while in motion, to his injury, only upon clear proof that the act was done by such employe in the course of his employment and within the scope of his authority: *Bess v. Chesapeake etc. R. R. Co.*, 35 W. Va. 492; 29 Am. St. Rep. 820. A railroad company is liable for the willful and wanton acts of a brakeman in ejecting a trespasser from a train while it is in motion: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28.

NEGLIGENCE.—THE MERE FAILURE to ward against a result which could not reasonably have been expected is not negligence: *Davis v. Chicago etc. Ry. Co.*, 93 Wis. 470; 57 Am. St. Rep. 935.

TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.—Where there is no conflict in the evidence, the court may, in instructing the jury, assume it to be true, and charge upon it directly without any hypothesis: *Bynon v. State*, 117 Ala. 80; 67 Am. St. Rep. 163, and note; *State v. Jackson*, 36 S. C. 487; 31 Am. St. Rep. 890.

GORALSKI v. KOSTUSKI.

[179 ILLINOIS, 177.]

COTENANCY—PRIVATE ALLEY.—Owners of lots abutting upon a private alley, established for their common benefit and appurtenant to each lot, have a unity of possession and are cotenants therein.

COTENANCY—DUTY OF COTENANT TO PAY TAXES.—A widow entitled to unassigned homestead and dower in property on which she resides, and holding with her children in cotenancy, is bound, in order to protect their common interest, to contribute toward the taxes upon a private alley constituting part of the common property.

COTENANCY—TAX TITLES.—While cotenants remain in the actual possession of the common property and maintain the unity of possession by actual common use, neither, as against his fellow tenants, by purchasing a tax title upon the common premises can obtain a title that is not subject to the election of the cotenants, within a reasonable time, to avail themselves of the purchase by contributing their proper proportion to reimburse the purchasing tenant.

E. J. Price, for the appellants.

King & Gross and J. Stelk, for the appellees.

¹⁸⁰ **BOGGS, J.** Lot 5 was the homestead of Stephen Malinowski, deceased. Section 2 of the homestead exemption act operated to continue a right of homestead therein for the benefit of his widow Barbara and their minor children. Barbara was also entitled to dower in the premises. Neither

homestead nor dower had been assigned. The widow and children remained in possession of the premises, and having unity of possession their relation to each other was that of tenants in common, the mother, by reason of the parental relation, having the superior right of control: ¹⁸¹ *Montague v. Selb*, 106 Ill. 49; *Freeman on Cotenancy*, 2d ed., sec. 108.

The alley was established for the common use and benefit of the owners and occupants of lots 1, 2, 3, 4, and 5. It was highly convenient and beneficial to the full and complete enjoyment of said lots by the owners and persons in possession. It was an appurtenance to each of said lots, and the right of possession thereof was common to all occupants and owners of each of said lots. Such occupants and owners, including said Barbara, had unity of possession of the alley and were tenants in common therein. Tenancy in common requires but one unity—that of possession: *Freeman on Cotenancy*, 2d ed., sec. 86. The possession of said lot 5, held by said Barbara for herself and her said minor children, carried with it, as incident thereto, the right to use the alley in common with the owners and occupants of the other lots. She realized the value of the alley as an appurtenance to said lot 5 and insisted on all her rights therein. She invoked the aid of a court of chancery to prevent others from closing it up or obstructing it. Her cotenants in lot 5 had common interest with her in the alley. It was private property and was subject to taxation. It was essential the taxes should be paid in order to preserve it for her use and the use of her children who had their home with her on said lot 5 and whose rights and interests were in her charge. She received the entire income from the flats on lot 5 and enjoyed the use of the other building thereon as a home. Her duty to her children and her own interest required she should have contributed to the payment of the taxes upon the alley. She recognized her duty and obligation to pay taxes on said lot 5. It was equally important to the rights and interests of her children, her cotenants, taxes should also be paid on the alley, and, as we think, equally her duty to contribute to the payment of the taxes on the alley as to pay the taxes on the lot. She was, as we have seen, also ¹⁸² tenant in common in the alley with the appellees, the owners of lots 1 to 4 inclusive, and enjoyed, in common with them, the possession and benefit of the alley.

Mr. Freeman, in his work on *Cotenancy and Partition*, says it is the general rule a cotenant will not be permitted to assert against his cotenants a title acquired by purchase at a tax sale

for taxes imposed on the common property during the joint ownership, and that where the cotenant purchasing at a tax sale is in fault for not making payment on his own moiety, there is no doubt that his purchase cannot be enforced against his companions except as a basis for compelling them to reimburse him for their pro rata of the sum paid to relieve the common property from a common burden: Freeman on Cotenancy and Partition, sec. 158. In Blackwell on Tax Titles, section 571, it is said: "It is a general principle that no person can be allowed to purchase [at a tax sale] who is in a situation of trust or confidence with respect to the subject of the purchase, or where he has a duty to perform inconsistent with the character of purchaser. But where a joint tenant or tenant in common buys an outstanding title which is adverse to the common title, the purchase is not void but subject to the election of the co-owners, who must, within a reasonable time, elect to avail themselves of the purchase and offer to contribute their share of the purchase money."

No objection is urged to the tax deed in this case other than the relation of Mrs. Malinowski to the property purported to be conveyed by it forbade her from buying it except for the benefit of all interested with her in the alley. The position of counsel for appellants is that it is to be considered the deed is otherwise effective and valid, and that it operated to vest the title to the alley in Baird, the purchaser at the tax sale, and that Baird, by force and effect of the tax deed, became seised of the absolute title in fee to the alley, and that the relation of tenants in common which formerly existed was thereby destroyed, ¹⁸³ and those who had formerly sustained that relation were absolved from all further duty pertaining to it. Black on Tax Titles, section 284, and cases cited by that author, seem to support this view. Mr. Freeman, in his work on Cotenancy and Partition, section 159, says the cases relied upon to support the position "do not represent the true state of the law, because they are directly in conflict with the well-settled rule that a person under any legal or moral obligation to pay the taxes cannot, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself or by subsequently buying from a stranger who purchased at the sale, otherwise he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. . . . If a long period elapses after the creation of a tax title,

and the purchaser is regarded and treated by the late cotenants as the true owner, and the latter, on their part, have abandoned all pretensions to the property, then it may be that either of them is at liberty to disregard his former relations and to purchase the whole property for himself." Each of these authors cites adjudged cases in support of the position assumed.

Without adverting further to this conflict of authority, it is sufficient for all the purposes of this case we should hold, as we do, that while cotenants remain in the actual possession of the common property and maintain the unity of possession by actual common use, neither, as against his fellow tenants, by purchasing a tax title based upon a sale of the common premises for the unpaid taxes in the payment whereof said purchaser was in part in default, can obtain a title that is not subject to the election of the cotenants, within a reasonable time, to avail themselves of the benefit of the purchase by contributing their proper proportion to reimburse the purchasing tenant for relieving the common property from a common burden. In the case at bar, the relation of tenants ¹⁸⁴ in common actually existed when said Barbara received a conveyance from the holder of the title, and the rule that the purchase inured to the common benefit of all cotenants was properly applied by the Chancellor.

The decree is affirmed.

COTENANCY—WHO ARE COTENANTS.—Persons owning undivided interests in real property are tenants in common, though their titles were acquired by separate conveyances and at different times: *Stevens v. Reynolds*, 143 Ind. 467; 52 Am. St. Rep. 422; *Metcalfe v. Miller*, 96 Mich. 459; 35 Am. St. Rep. 617.

COTENANCY—PURCHASE OF TAX TITLE BY COTENANT.—A cotenant in possession cannot acquire title as against his cotenant by purchasing a tax title to the common property: *Thompson v. McCorkle*, 136 Ind. 484; 43 Am. St. Rep. 334. A cotenant, whether in or out of possession, cannot buy and hold a tax title against the other cotenants: *Cohea v. Hemingway*, 71 Miss. 22; 42 Am. St. Rep. 449; *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678, and note. But when the interests of several cotenants are assessed, neither is under obligation to pay the taxes due from the other, and therefore, either may purchase the interest of the other at a tax sale thereof and assert any title acquired from such sale: *Bennett v. North Colorado etc. Co.*, 23 Colo. 470; 58 Am. St. Rep. 281, and note.

COTENANCY—TAXES—CONTRIBUTION.—A tenant in common who pays the taxes against the whole of the common property is entitled to contribution from his cotenants to the amount of the taxes due by each on his interest: *Cocks v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28, and note; *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949; *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678.

Tidow & Dockweiler

WIKE v. GARNER.

[179 ILLINOIS, 257.]

HOMESTEADS—HEAD OF FAMILY—WHO IS.—A bachelor residing on premises with his two sisters, who are dependent upon him for support, is a householder having a family, of which he is the head and entitled to a homestead exemption.

HOMESTEADS—COTENANT'S RIGHT TO.—An undivided interest in land, accompanied by the exclusive possession, management, and control in consideration of maintenance of his cotenant, is sufficient to support a right of homestead in the occupying cotenant.

HOMESTEADS—OCCUPANCY WITHIN REASONABLE TIME.—If a person buys a lot for a home, and erects a house thereon, a creditor cannot acquire a lien on the property, if, within a reasonable time, the purchaser moves on the property and occupies it as a homestead.

HOMESTEADS.—RIGHTS OF CREDITORS as to property occupied by their debtor as his homestead, after filing a bill to cancel a previous satisfaction of their judgment to enjoin the sale of the property and subject it to such judgment, attach from the date of the decree and not from the time of the filing of the bill, if the court does not cancel the satisfaction of the judgment, but enters a money decree and directs execution to issue.

W. E. Williams, for the appellant.

W. L. Coley, for the appellee.

261 **CRAIG, J.** This is a writ of error sued out to reverse a decree of the circuit court of Pike county. It appears from the record that plaintiffs in error, John and George Wike, on the eleventh day of September, 1893, obtained a judgment before a justice of the peace against defendant in error, Jonathan Garner, for the sum of one hundred and fifty-three dollars and costs. On the sixteenth day of the same month, on the oath of plaintiffs, an execution was issued on the judgment and delivered to a constable. On the eighteenth day of the same month the execution was returned nulla bona, and on the same day a transcript of the judgment was made out and filed in the office of the clerk of the circuit court. Thereafter, on the twenty-fifth day of August, 1894, an execution was issued on the judgment and delivered to the sheriff. The sheriff levied on real estate, which was advertised and sold to plaintiffs in error on the 22d of September, 1894, for the amount of the judgment and costs, and the execution was returned satisfied. Upon the expiration of the time allowed by law for redemption, December 24, 1895, the sheriff made plaintiffs a deed for the land sold. Upon obtaining the deed plaintiffs in error discovered that defendant in error never owned or had any title to the land which

had been sold. Thereupon they filed this bill to vacate the satisfaction ²⁶² of their judgment and to enjoin the defendant in error from selling a certain house and lot in the town of El Dara, which it was alleged he owned, and to subject the property to sale in payment of the judgment.

The defendant answered denying the allegations of the bill and alleging "that the deed to such property was taken in his name together with that of his sister, Susan Garner, and the said property was paid for by him and the said Susan Garner, and was bought by them with the intention and for the purpose of using the same as and for a home for him, the defendant, and his sister Susan Garner and his sister Emma Garner, who then was, and for a long time prior thereto had been and now is, a distracted person and dependent upon him for care and support, and he, together with the two sisters aforesaid, as soon thereafter as a house could be erected upon the premises, did occupy the same as a home, and since then have and now do occupy the same, which said above described property does not exceed in value one thousand dollars; that he is the head of the family, consisting of himself and his sisters, Susan and Emma Garner aforesaid, and that they, the said sisters, now are, and since, to wit, November 20, 1889 (at which time his father died), have been dependent upon him for support, and he has since that time supported them and taken upon himself the duty so to support and care for them."

On the hearing the defendant in error testified as follows: "I am postmaster at El Dara. I am thirty-three years of age. Parents are not living. Father died in 1889 and mother in 1896. I live with two sisters. One sister is a year older than myself—a distracted person. Has been since she was fifteen years of age. My other sister is thirty years old, and she keeps house for us. We have lived together since mother died, and I have supported and cared for the two girls since that time. I bear all the expenses. I own no property at El Dara except the house and lot—the same property described ²⁶³ in the bill. I bought the property in June of this year (1897). The title to the property is in myself and sister Susan. That is the sister that is not distracted. We proceeded to build a residence at once. We moved into the residence and now occupy it. We bought the lot for a home. The house and lot was six hundred dollars. Paid one hundred and thirty dollars for the lot. The building cost about four hundred and fifty dollars. I claim to be the head of the family and to occupy the house as a home-

stead." On cross-examination, the witness further testified that at the time the injunction was served he had contracted to sell the place for six hundred and fifty dollars and intended to invest the money in another home. The testimony of this witness was not contradicted nor were the facts disclosed by him controverted.

Among other facts found by the court and incorporated in the final decree are the following: "The court further finds that the said Jonathan Garner and his sister, Susan Garner, purchased said property and erected a residence thereon for the purpose and with the intention of making the same a homestead; that he is a single man, residing with a family consisting of two sisters, and that he is the head of the same. The court further finds that at the time of service of the writ of injunction herein and the commencement of this suit said property was the homestead of the defendant, and that the same was exempt from execution and sale and that the same was not subject to the lien of any judgment obtained by complainants, and that the injunction should be dissolved."

Three questions are raised in the argument of counsel for plaintiffs in error: 1. Will the undivided interest of the defendant, under the circumstances of the case, support a homestead right; 2. Will the mere intention to occupy property as a homestead, not carried into effect by subsequent actual occupancy, support a homestead right; and 3. Will the homestead right attach by the voluntary act of the claimant moving into and ²⁶⁴ occupying the property and claiming the same as a homestead, pending the injunction proceedings?

Section 1 of the homestead act provides "that every householder having a family shall be entitled to an estate of homestead, to the extent in value of one thousand dollars, in the farm or lot of land and buildings thereon owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence." In *Holnback v. Wilson*, 159 Ill. 148, 154, in considering the question who might be regarded as a householder, we said: "A bachelor or a widower who occupies a home, as the head of a family, on land which he desires to set apart as a homestead, who has living with him a mother, father, sisters, or brothers who are dependent upon him for support, and where there is a corresponding duty of support resting on him, might properly be regarded as a householder having a family within the meaning of the statute." The defendant in error, Jonathan Garner, occupied a house with two sisters. He and they consti-

tuted the family. He, as appears from the evidence, was the head of the family and the two sisters were supported by him. We think, therefore, under the facts as they appeared in evidence, the defendant in error was a householder having a family, within the meaning of the statute.

By purchasing the lot which plaintiffs in error seek to subject to the payment of their debt against Jonathan Garner, it is apparent that if he had taken the title in his own name he would be entitled to claim the benefit of the homestead exemption act. But the title to the lot was conveyed to Jonathan Garner and Susan Garner, his sister, and it is claimed that as Jonathan Garner held only an undivided one-half interest in the property he could not claim the benefit of the homestead act. This question arose in *Brokaw v. Ogle*, 170 Ill. 115, and it was there held that an undivided interest in land, accompanied by exclusive possession, will support a right of homestead in one of the cotenants. Here Jonathan Garner ²⁰² was in the undisputed possession of the entire property. While Susan Garner owns the fee to an undivided half of the lot, she accords to Jonathan Garner the sole possession, management, and control of the property. The statute does not require the householder to own the fee to enable him to claim the benefit of the homestead act. On the contrary, the statute expressly provides that the householder shall be entitled to an estate of homestead in the property owned or rightly possessed, by a lease or otherwise. Under this statute, if defendant in error owned an undivided half and had a lease of the other half, no reason is perceived why he might not claim the benefit of the statute, and that was, in effect, his position, as he owned one-half and occupied the whole property with the consent and agreement of the owner of the other half, and she in turn received her support. Indeed, we are inclined to the opinion that where a householder is in the exclusive possession of a lot of land occupied by him as a residence, it does not concern the judgment creditor whether such householder possesses the fee, an estate for life or for years, or what title he may have. Here the controversy is solely between plaintiffs in error, as judgment creditors, and defendant in error, and as against his judgment creditors defendant in error is entitled to claim the exemption of the statute.

It is next claimed that there was a mere intention to occupy the property as a homestead, which was abandoned, and hence no right of homestead existed in favor of the defendant in error. The evidence shows that the defendant in error purchased the

lot for a home, and that he proceeded at once to erect a house thereon for a residence. When the house was about completed defendant in error had an offer for the place, and concluded to sell and invest the money in another place, but after the bill was filed he abandoned the sale and moved into the house, and since that time occupied it as a homestead. We do not think the fact that the defendant in error made up ²⁶⁶ his mind to sell the property but did not consummate the sale deprived him of the right, when he saw proper to move in and occupy the property as a residence, to claim it as a homestead. The property was worth less than one thousand dollars, and if the lot was purchased and the house erected for a residence, and was followed by actual occupancy by defendant in error without unreasonable delay, as the evidence shows was the case, it was not liable to be seized and sold by plaintiffs in error on any judgment or decree they might obtain. Where a person buys a lot for a home, as was the case here, and erects a house on the lot, a creditor cannot acquire a lien on the property, if, within a reasonable time, the purchaser moves on the property and occupies it as a homestead. The rule laid down in *Crawford v. Richeson*, 101 Ill. 351, applies here.

It is finally claimed that defendant in error, by moving into and occupying the property, claiming it as a homestead, could not defeat the intervening rights of plaintiffs in error—in other words, it is claimed that defendant in error could acquire no rights by moving in property after the bill was filed. The bill was filed to enjoin defendant in error from selling the property, but he was not enjoined from moving into the property or using it as he might desire. When the bill was filed plaintiffs in error had no lien on the property. Indeed, they had no judgment against defendant in error. Their judgment had been satisfied, and one object of the bill was to vacate the satisfaction and reverse the judgment. Plaintiffs in error, so far as the property was concerned, had no intervening rights to be defeated. Section 1 of chapter 77 of the Revised Statutes provides “that a judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained, situated within the county for which the court is held, from the time the same is rendered or revived, for the period of seven years, and no longer.” It will be observed that the court, by its decree, did not cancel or set aside the satisfaction of the judgment, ²⁶⁷ but entered a money decree and directed execution to issue. Under such circumstances, as is suggested in ar-

gument of defendant, the rights of plaintiffs in error to subject any property of the defendant to the payment of their demand dates from the time their decree was rendered, which was July 2, 1898. When the decree was rendered, and for a long time previous to that date, defendant in error was occupying the house and lot in question as a homestead.

We think the court properly held that the property in question was the homestead of the defendant in error, and the decree will be affirmed.

HOMESTEAD—COTENANT'S RIGHT TO.—A tenant in common is entitled to a homestead in the common estate: See note to *Arendt v. Mace*, 9 Am. St. Rep. 209; contra, *Bishop v. Hubbard*, 23 Cal. 514; 83 Am. Dec. 132. See note to *Wolf v. Fleischacker*, 63 Am. Dec. 122.

HOMESTEAD—OCCUPANCY.—Homestead rights attach to a lot which has been purchased for a homestead, and which the purchaser intends to use as such, though he has not yet occupied it, and it is not fit for such occupancy until he can have a residence built thereon, if he is proceeding in good faith to secure the erection of such residence for the purpose of using it as his home: *Cameron v. Gebhard*, 85 Tex. 610; 34 Am. St. Rep. 832, and note.

As to whether actual occupancy is necessary in order to stamp property with the character of a homestead, see *Mason v. Columbia Finance etc. Co.*, 99 Ky. 117; 59 Am. St. Rep. 451.

Homesteads—Head of Family—Who is.*

The head of a family, within the meaning of exemption and homestead statutes, is one who controls, supervises, and manages the affairs about a home; but is not necessarily a father or husband. A family is generally understood to be a collective body of persons who live in one house, under one head or manager: *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165. Any individual of either sex may be the head of a family. It is not necessary that he or she should be married; *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304. It is not necessary that the relation of husband and wife, or of parent and child should exist, in order to constitute a family having a head within the meaning of the homestead law. The exemption extends to one who has residing with him those so connected with him by blood, or ties of residence and association, as to become part of his household, and who have no residence but that which they enjoy under his favor, and whom he is under a legal or moral duty to support: *Moyer v. Drummond*, 32 S. C. 165; 17 Am. St. Rep. 850. "The whole theory and policy of the homestead law is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children, and other persons dependent upon him toward whom he stands almost in loco parentis, which is, if not paramount, equal to his obligations to pay his debts, and the family may consist of a wife and children, or of other persons

*REFERENCE TO MONOGRAPHIC NOTE.

Head of family, who is: 61 Am. Dec. 586-593.

who may stand in a state of dependence in the family relation, or it may consist of persons standing in either of these relations, whether the father or mother, or a brother or sister, or other relation is the head; but they must be persons who are dependent, in some measure, on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution or other process, and who would be benefited by its exemption": *Calhoun v. Williams*, 32 Gratt. 18; 34 Am. Rep. 759.

The leading idea of the homestead laws is doubtless to secure to such persons as constitute a family, primarily considering the husband or father as the head thereof, in contradistinction to single persons, a home, and to foster and upbuild the family interest, upon which, mainly, society depends. The idea of a family cannot be disassociated from the idea of an assemblage of persons among whom some are dependents and over whom some one of their number has and legally exercises control. This one is their head, and the only one who is entitled to claim a homestead exemption in their behalf. To constitute a family with a head within the meaning of such laws, there must be a state of dependence in law, if not in fact, upon the part of some of those who constitute the family, or some other member of the family whom the law designates as the head thereof, and this dependence may result, as a matter of law, from the relationship existing between the parties, whether they be parent and minor child, husband and wife, guardian and ward, or master and servant or other relation. Or it may result, as a matter of fact, from the head of the family controlling the homestead property, in which the dependent has either a present or prospective interest. This state of dependence necessarily implies, upon the part of the person whom the law designates as the head of the family, not only a control of the dependent, or of the property in which the dependent has an interest, either present or prospective, but also implies a legal right to such control. There must be a mutual obligation between the parties which entitles the one to control, and which imposes upon the other the duty of submitting to such control, and there must be also not only a dependence, but also, upon the part of the head of the family, a corresponding obligation to provide for the wants of the dependent, let that obligation result from whatever fact it may.

Husband.—Any man who has a wife is, while the marriage de jure exists, the head of a family, within the meaning of homestead or exemption statutes, although he has no children: *Whitehead v. Tapp*, 69 Mo. 415; *Cox v. Stafford*, 14 How. Pr. 519; *Brown v. Brown*, 68 Mo. 388; and it makes no difference that his wife may have deserted him and may be residing in another state, and that he may be living in improper relations with another woman: *Whitehead v. Tapp*, 69 Mo. 415; *Brown v. Brown*, 68 Mo. 388. A husband who has his children at school away from home, or temporarily separated from him in any way, while his relation to them as his family continues, and while he supports them, is still their head, and may declare a homestead in their favor: *Seaton v. Mar-*

shall, 6 Bush. 429; 90 Am. Dec. 683; Robinson's Case, 3 Abb. Pr. 466. But a husband in one state, with a family in another, cannot be considered the head of a family in the former, though he shows that during his residence in the former state he was accompanied by his son. He must also show that his son is dependent upon him for support: Allen v. Manasse, 4 Ala. 554.

Unmarried Man.—Any individuals of either sex may be the head of a family, and it is not necessary that such head should be a married man; there must, however, be some dependence upon such head in order to enable him to declare a homestead: Revalk v. Kraemer, 8 Cal. 72; 68 Am. Dec. 304. Thus, an unmarried man whose indigent mother and sisters live with, and are supported by, him, is the head of a family within the meaning of the homestead statute: Marsh v. Lazenby, 41 Ga. 153. A bachelor, for whom a sister keeps house, and whom he supports, is the head of a family: Bailey v. Comings, 16 Bank Reg. 382, Fed. Cas. No. 733. And a brother who resides with his sister in her house, the rental value of which is insufficient to support her, and who supports her and manages the household, is the head of a family, and entitled to the chattel exemption allowed by the homestead law: Moyer v. Drummond, 32 S. C. 165; 17 Am. St. Rep. 850. A widower without children, whose mother is the sole member of his family, is its head if he supports her, within the meaning of a statute exempting from forced sale the homestead of every head of a family: Parsons v. Livingston, 11 Iowa, 104; 77 Am. Dec. 135. A father living with his indigent widowed daughter and her children, dependent upon him, is entitled to a homestead as the head of the family: Blackwell v. Broughton, 56 Ga. 390. A father and his illegitimate children living with him constitute such a family as may assert homestead rights, and such rights cannot be defeated by the fact that such father permits a woman with whom he unlawfully cohabits to dwell on the land: Lane v. Phillips, 69 Tex. 240; 5 Am. St. Rep. 41. A son is in legal contemplation the head of a family, if he is of full age and assumes the obligation of providing for a widowed mother and her children, with whom he lives, and who are dependent on him: Connaughton v. Sands, 32 Wis. 387; and if a man and his sister live together, both owning some personal property, and contributing toward their household expenses, the brother directing and controlling the affairs of the household, he is a householder and entitled to an exemption: Graham v. Crockett, 18 Ind. 119.

To constitute a family within the meaning of the homestead laws, a mere aggregate of individuals in the same house is not sufficient. There must also be an obligation, legal or moral, upon the head of the house to support the others, or some of them, and on their part, a corresponding state of dependence: Bosquett v. Hall, 90 Ky. 566; 29 Am. St. Rep. 404; Harbison v. Vaughn, 42 Ark. 539. Hence, when the persons residing with a debtor, though children, are strangers in blood to him, and he is under no legal or natural obligation to support them, he is not the head of a family so as to be entitled to a homestead exemption: Bosquett v. Hall, 90 Ky.

566; 29 Am. St. Rep. 404. It has been held that a family composed of persons neither related by blood nor connected by marriage cannot have a head who is entitled to declare a homestead exemption: *Howard v. Marshall*, 48 Tex. 471. Hence, a widower cannot thus exempt his property by voluntarily taking upon himself, for some temporary or indefinite period, the support of persons having no claim upon him in law or morals. Such a union of persons in one household, directing their attention to a common object, does not constitute a family: *Whitehead v. Nickelson*, 48 Tex. 517. An unmarried man, with whom his brother and sister-in-law reside, and for whom they keep house, he furnishing the necessities of life, is not the head of a family: *Whalen v. Cadman*, 11 Iowa, 226. A widower without children or others dependent upon him is not entitled to a homestead exemption: *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304. A father residing with his adult daughter, who has been married and separated from her husband, and whom the father is under no obligation to support, is not the head of a family: *Walker v. Thomason*, 77 Ga. 682. And it has been held that an indigent sister and her children, though mainly dependent on their brother for support, and living with him, do not constitute a family for whose benefit he can take a homestead, because he is not legally bound to support them. "If the applicant could obtain a homestead as the head of a family of persons whom he is not legally bound to support, then he might enjoy it for his own benefit exclusively, and refuse with impunity to support those for whose benefit he claimed to have obtained it": *Dendy v. Gamble*, 64 Ga. 528. A man and woman living together in adultery do not constitute a family within the meaning of the law exempting the homestead of the head of a family from forced sale under execution: *Lane v. Phillips*, 69 Tex. 240; 5 Am. St. Rep. 41.

A bachelor having no children or other persons dependent upon him, and no one residing with him except servants and employés, is not the "head of a family," though he is a householder and keeps house, in the sense that such term is used in constitutional and statutory provisions, with reference to homestead exemptions: *Calhoun v. Williams*, 32 Gratt. 18; 34 Am. Rep. 759; *Garaty v. Du Bose*, 5 S. C. 493. Consequently, a man with no family of his own, but renting a house, in which he resides with a number of persons whom he is under no obligation to support and to whom he is in no manner related, is not entitled to a homestead exemption: *Holnback v. Wilson*, 159 Ill. 148. "A collection of individuals occupying a house, in no manner related or connected with each other, no obligation resting on the head of the household to support the others and no dependence existing on their part upon the head of the family, cannot, in our opinion, be regarded as a family, within the meaning of the homestead act. But we do not think that it was intended by the legislature to restrict the operation of the statute to a married man with a family. A bachelor or a widower who occupies a house as the head of a family, on land which he desires to set apart as a homestead, who has living with him a mother, father, sisters or brothers who are dependent upon

him for support, and where there is a corresponding duty of support resting on him, might properly be regarded as a householder having a family, within the meaning of the statute": *Holnback v. Wilson*, 159 Ill. 148, 154.

Wife.—Whether a wife may, while her husband is living, be considered the head of the family for the purpose of declaring a homestead, even in her separate property, is a much disputed question, but the conflict arising in the authorities may, to a great degree, be reconciled by reason of the different phraseology employed in the homestead statutes of the several states.

The majority of the cases hold that the statutory homestead or exemption cannot be taken in property which does not belong to the head of the family, and that a wife living with her husband and children is not the head of the family. Hence, she is not entitled to have property, the title to which is in herself, exempted from levy and sale, for the benefit of herself and her minor children. In an early case in California it was doubted whether the separate property of a wife could become a homestead: *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304. While in *Rosenberg v. Jett*, 72 Fed. Rep. 90, it was held that during coverture, and while the husband and wife are living together, there can be no such thing as a separate homestead of a wife, distinct from that of her husband.

A married woman living with her minor children and with her husband as a member of his family is not entitled, even under the most liberal statutes, to have a homestead set apart to her as the head of a family out of her separate estate, although her husband may be physically weak and unable to work, and possessed of no property, nor means of support: *Johnson v. Little*, 90 Ga. 781. A wife is not the head of the family and cannot take a homestead in her separate property for the benefit of herself, her minor children by a former marriage, and a minor child by her present husband, with whom she lives: *Neal v. Sawyer*, 62 Ga. 352. The law does not confer the privilege of a homestead upon a married woman for the reason that during the marriage her husband is the head of the family, upon whom devolves its support, and whether, in exceptional cases, the wife may have to contribute to the support of the family or not cannot affect the interpretation of an unambiguous statute: *Fuselier v. Buckner*, 28 La. Ann. 594. A wife who has no family individually dependent on her for support, and whose husband is able to work and support her, and who owns more land than is exempt from seizure, cannot claim the benefit of a homestead statute: *Taylor v. McElvin*, 31 La. Ann. 283.

On the other hand, in *Thompson v. King*, 54 Ark. 11, it was held that the expressions "married or the head of a family," used in a homestead statute as designating who might declare a homestead, are not synonymous, or mere equivalents the one for the other, and that all of either sex, who are either married or the heads of families, are entitled to the exemption. The object of the statute "is to protect the home of the married and the family against seiz-

ure and sale, and no reason can be advanced why the land of the wife occupied as the home of the husband and his family should not be protected as well as the land of the husband should be when it is a homestead": *Thompson v. King*, 54 Ark. 11. In Mississippi, the law gives a homestead to every owner of land being a householder and head of a family. In that state, it has been held that a married woman owning separate estate, and residing thereon as a domicile with her family, is entitled to a homestead therein, although a husband is the head of the family in the sense that the wife and children are subject to his marital and paternal control; yet he has no authority or control over the separate property of the wife or the application of it to the support of the family. Hence, the wife may declare a homestead therein.

In a late case in Illinois, it was decided that a statutory expression that every householder having a family is entitled to a homestead exemption does not require such householder to be the head of a family, and a wife is entitled to the exemption in her separate property when occupied as a homestead by herself, husband, and children: *Zander v. Scott*, 165 Ill. 51. Under the Colorado statute, a wife has the character of the head of the family, while occupying with her husband her property as a home, so as to enable her to designate and affect it with the character of a homestead, and thus exempt it from seizure and sale for the joint debt of herself and husband: *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579; *Norton v. Bradham*, 21 S. C. 375; and under the South Carolina statute the right of a homestead exemption, as against her own debts, is extended to a wife living with her husband who has no property: *Norton v. Bradham*, 21 S. C. 375. Under the California statutes, a husband is designated as the head of the family for the purpose of declaring a homestead exemption, but upon his failure to declare it the wife is given the right to declare a homestead on their property for their joint benefit: California Civ. Code, secs. 1261, 1262. After the husband has declared a homestead in his property, the wife cannot declare another in her separate property: *Neal v. Sawyer*, 62 Ga. 352.

Widow or Unmarried Woman.—It is a well-settled rule that a widow as the head of a family, consisting of herself and minor child or children, is entitled to a homestead out of his or her estate: *Groover v. Brown*, 60 Ga. 60; *Smith v. Wright*, 13 Tex. Civ. App. 480; *Wood v. Wheeler*, 7 Tex. 13; *Norris v. Moulton*, 34 N. H. 392. When a widow, who is the step-mother of her deceased husband's minor children, undertakes to keep together, care for, and support them, she has a right, as the head of a family, to take a homestead in his real estate: *Holloway v. Holloway*, 86 Ga. 576; 22 Am. St. Rep. 484; *Sanderlin v. Sanderlin*, 1 Swan, 442; *Brigham v. Bush*, 33 Barb. 596. Upon the death of a husband, his widow takes the capacity as head of the family, with all the incidents, privileges, and responsibilities attached to it; and if she and her children continue to reside together in the house of her deceased husband, and constitute a family, she is entitled to a homestead exemption as the head of a family: *Becker v. Becker*, 47 Barb. 497.

If a widow, with her children, resides in the house, and on the land of her aged father, she has been held to be the head of a family: *Bachman v. Crawford*, 3 Humph. 214; 39 Am. Dec. 163; and if a widow keeps house upon land allotted to her in dower without children of her own, but with five orphan children of a deceased sister who have been members of the family during the husband's life, and with two orphan children of her late husband's sister, she is the head of a family: *Ex parte Brien*, 2 Tenn. Ch. 33. A widow occupying a house and lot as her homestead, with two adult children living with her, has been held to be a house-keeper and head of a family: *Brooks v. Collins*, 11 Bush, 622. But it has been held under the North Carolina statute, that a widow cannot have a homestead laid off to her and her minor children after the death of the husband, when he dies without leaving debts: *Hager v. Nixon*, 69 N. C. 108. And it has also been held that a widow who has no children living with her dependent on her for support, is not entitled to a homestead out of the property of her deceased husband as the head of a family: *Kidd v. Lester*, 46 Ga. 231.

An unmarried woman, keeping house, and bringing up two children of her deceased sister, is the head of a family and entitled to a homestead exemption: *Arnold v. Waltz*, 53 Iowa, 706; 36 Am. Rep. 248. So is a single woman, who supports an invalid sister who resides with her and has no other means of support: *Chamberlain v. Brown*, 33 S. C. 597. An unmarried woman who has the care and custody of her minor bastard child is entitled to a homestead as the head of a family: *Ellis v. White*, 47 Cal. 73. But a woman who has never been married, and who has no children, is not entitled to a homestead under the Massachusetts statute, though she lives with her mother: *Woodworth v. Comstock*, 10 Allen, 425. Although an adult daughter owns part of the premises in which her parents reside, while she lives elsewhere and aids her brother in supporting such parents, does not constitute her the head of a family so as to entitle her to claim such premises as a homestead: *Ridenour-Baker Co. v. Monroe*, 142 Mo. 165.

Separation or Divorce.—A husband does not cease to be the head of the family, in the eyes of the law, by reason of his desertion by his wife. As such head he retains the home until and to which she may return. While the marriage relation exists he is the head of the family, although he has no family but his wife, and she has left the home: *Brown v. Brown*, 68 Mo. 388; *Gladney v. Berkley*, 75 Mo. App. 98; *Gates v. Steele*, 48 Ark. 539. Although his wife may have deserted him, and may be residing in another state, and he himself may be living in improper relations with another woman, he is still regarded as the head of the family within the meaning of the homestead law: *Whitehead v. Tapp*, 69 Mo. 415. A husband who lives with his family remains the head thereof, although he fails to support such family, quarrels with his wife, and occupies a separate bed: *Barry v. Western Assur. Co.*, 19 Mont. 571; 61 Am. St. Rep. 530. But a husband who has

voluntarily allowed his family to separate, and has abandoned the maintenance of a family home, cannot set up a homestead exemption: *Cooper v. Cooper*, 24 Ohio St. 488.

The protection of a homestead exemption is still retained by the wife and minor children of a man who has left the state and desires them to follow him, so long as they remain upon the homestead left by him. Upon the husband's leaving the state, the wife becomes the head of the family, and she cannot be prevented from remaining in the state and continuing the occupancy of the home, whatever may be the purposes or desires of the husband after leaving the state: *McDannell v. Ragsdale*, 71 Tex. 23; 10 Am. St. Rep. 729. A wife permanently separated from her husband by agreement, after his neglect to support her, may acquire a homestead as a householder and head of a family: *Kenley v. Hudelson*, 99 Ill. 493; 39 Am. Rep. 31. And where a married woman has been abandoned by her husband, but is living with and supporting her child, she is the head of a family: *Nash v. Norment*, 5 Mo. App. 545. The fact that a husband has absconded and left the state, leaving his family to care for themselves, is an abandonment of them, entitling the wife to declare a homestead, no matter what the motive of such abandonment was, whether fear of criminal prosecution or dissatisfaction with his family: *People v. Stitt*, 7 Ill. App. 294. In Alabama, it is held that a married woman, having no children, whose husband resides out of the state, is not entitled to claim the benefit of a homestead exemption: *Keiffer v. Barney*, 31 Ala. 192.

A divorce obtained by a wife does not deprive her of her homestead rights acquired during coverture in her husband's land, when she continues to reside upon it with her minor children, and is the head of the family. This is especially true where the husband has first abandoned the wife before she secures the divorce, and he has not acquired a homestead elsewhere: *Blandy v. Asher*, 72 Mo. 27; *Bonnell v. Smith*, 53 Ill. 375.

The guardian of a minor child is entitled to a homestead as the head of a family: *Roundtree v. Dennard*, 59 Ga. 629; 27 Am. Rep. 401. And an adopted child occupies the same place in the family under homestead exemption laws as a child of the blood. Hence a landowner who, together with his adopted daughter and her husband, resides on the land forming one household, is the head of a family: *Wagener v. Parrott*, 51 S. C. 489; 64 Am. St. Rep. 695. It has been held, however, that the adoption of another's child by an unmarried man, and the maintenance of servants and a household, does not constitute such man the head of a family entitled to a homestead: *In re Lambson*, 2 Hughes, 233.

A *tenant*, by renting and occupying the premises of the owner, cannot deprive the latter of such control over the property as to forfeit his right of homestead, where the owner boards and lodges in the house. The tenant cannot thus be made the head of the family: *Brown v. Brown*, 68 Mo. 388.

A *partnership* cannot be the head of a family, and the members of a firm cannot claim a homestead exemption in the partnership

property, one of the reasons therefor being that a partnership cannot be the head of a family as required by statute: *State v. Spencer*, 64 Mo. 355, 356; 27 Am. Rep. 244; and the general rule is, that the members of a partnership cannot jointly or severally claim an exemption in partnership property: *Kingsley v. Kingsley*, 39 Cal. 665; *Gupitil v. McFee*, 9 Kan. 30; *In re Handlin*, 3 Dill. 290; *Pond v. Kimball*, 101 Mass. 105; *In re Hafer*, 1 Bank. Reg. 547; *Fed. Cas. No. 5,896*; *In re Price*, *Fed. Cas. No. 11,410*, 6 Bank. Reg. 400; *In re Blodgett*, 10 Bank Reg. 145, *Fed. Cas. No. 1,555*; *Terry v. Berry*, 13 Nev. 515; *Wright v. Pratt*, 31 Wis. 99; *Gaylord v. Imhoff*, 26 Ohio St. 317; 20 Am. Rep. 762; *Drake v. Moore*, 66 Iowa, 58; *Hoyt v. Hoyt*, 69 Iowa, 174.

Children of a deceased owner cannot claim, each for himself, as the head of a family, a separate homestead out of the lands of the deceased debtor against his debt, but collectively they are entitled to one homestead, whether they are minors or adults: National Bank v. Senn, 25 S. C. 572.

SUPREME LODGE KNIGHTS OF PYTHIAS v. KUTSCHER.

[179 ILLINOIS, 340.]

ASSOCIATIONS—BENEFIT SOCIETIES — DELEGATION OF POWER.—The supreme lodge of a benefit society cannot delegate to a subordinate lodge the power to enact a by-law forfeiting the certificate of membership and all claims thereunder of any member whose death results from self-destruction, voluntary or involuntary, whether sane or insane.

ASSOCIATIONS— BENEFIT SOCIETIES— CONSTRUCTION OF CERTIFICATE.—A certificate of membership in a benefit society which binds the member to comply with all the laws governing the endowment rank which are in force when he becomes a member, or which may thereafter be enacted by the supreme lodge or the board of control, binds him to comply with such laws only as such board or the supreme lodge may lawfully enact and adopt.

ASSOCIATION—BENEFIT SOCIETY—ADOPTION OF BY-LAW.—The adoption by the supreme lodge of a benefit society of an unauthorized by-law passed by a subordinate lodge renders such by-law effective, and binds members of such subordinate lodge who have agreed to comply with the by-laws now "in force or that may be hereafter enacted by the supreme lodge."

ASSOCIATIONS—BENEFIT SOCIETIES.—THE CONSTITUTION OF A BENEFIT SOCIETY, if no part of its charter, has only the effect of a by-law, and cannot take from the rightfully constituted authorities of the society their inherent power to adopt, from time to time, such other by-laws as its charter permits or necessity requires.

ASSOCIATIONS—BENEFIT SOCIETIES—EFFECT OF BY-LAW.—A by-law of a benefit society forfeiting claims of a member for suicide is binding on one who joins the society before its passage, and whose contract requires compliance with the by-laws in force or "hereinafter enacted."

H. H. Field and Greene & Humphrey, for the appellant.

Connolly, Mather & Snigg, for the appellee.

341 PER CURIAM. The appellate court has affirmed a judgment of the Sangamon circuit court in favor of appellee, against appellant, on a certificate of membership issued by appellant to William C. Henry, payable to Louisa M. Henry, his wife. While in a drunken frenzy, Henry killed his wife and then himself, and the suit was brought by the administrator of her estate.

The applications of Henry for the certificate contained this clause: "I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed and this contract shall be controlled by all the laws, rules, and regulations of the ³⁴² order governing this rank now in force or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or submit to the penalties therein contained, to all of which I willingly and freely subscribe." They were made, respectively, June 4, 1889, and April 26, 1892. The certificate was issued to him July 19, 1892, and it certified that Henry received the obligation of the endowment rank of the order and was a member in good standing in said rank, and contained the following provisions: "And in consideration of the representations and declarations made in his applications, . . . which applications are made a part of this contract, and the payment of the prescribed admission fee, and in consideration of the payment hereafter to said endowment rank of all assessments as required, and the full compliance with all the laws governing this rank now in force or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or the board of control of the endowment rank, and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the board of control of the endowment rank Knights of Pythias of the World to Louisa M. Henry, his wife, as directed by said brother in his application, or to such other person. . . . And it is understood and agreed that any violation of the within-mentioned conditions or the requirements of the laws in force governing this rank shall render this certificate and all claims null and void, and that the said endowment rank shall not be liable for the above sum or any part thereof."

The by-laws of the order, called its "constitution," empowered the board of control to establish sections of the endowment rank, and to enact, alter, and amend, from time to time, all laws and regulations necessary to govern the same. Acting under this

authority, the board of control on January 13, 1893, passed the following alleged law for the government of the members of the endowment rank: "If the death of any member of the endowment ³⁴³ rank heretofore admitted into the first, second, third, or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then in such case the certificate issued to such member and all claims against said endowment rank on account of such membership shall be forfeited." The board of control reported its action in passing this law, with a copy thereof, to the supreme lodge at its regular session held in August and September, in 1894, where said report was by the action of that body referred to one of its committees, which committee reported to the supreme lodge in session approving the action of the board of control in adopting said law and recommending the adoption of the report. After the report had been printed it was adopted by the supreme lodge September 7, 1894. This by-law was published as one of the laws of the order.

These facts appear from the evidence adduced by the defendant under the issues. The trial court excluded the evidence of the defendant and instructed the jury to find for the plaintiff and to assess the damages at the amount specified in the certificate.

We regard the question as settled that the supreme lodge could not delegate to a subordinate body the power to enact laws of this character, and that said board of control had no power to enact said law: *Supreme Lodge v. McLennan*, 171 Ill. 417; *Supreme Lodge v. La Malta*, 95 Tenn. 157. There are, then, but two questions to be considered: 1. Was said alleged law binding upon Henry and his beneficiaries by virtue of his contract to comply with all the laws governing the endowment rank which were in force when he became a member or which might thereafter be enacted by the supreme lodge or the board ³⁴⁴ of control; and 2. If he was not bound by a law of the board of control which it had no power to enact, was the action of the supreme lodge adopting the report of its committee approving the action of the board of control and recommending the adoption of its report a sufficient adoption itself of said law, so as to make it a law, legally enacted, of said order?

After a further consideration of the case upon rehearing, we have reached the conclusion that, as a law of this character could be enacted only by the supreme lodge, it would be a strained construction of the contract to hold that the parties to it, by the terms employed, intended that the members of the order should be bound by it though enacted by a subordinate body having no lawful authority to do so. The board of control had power, by the laws of the order, to pass certain laws and regulations for the government of members of the endowment rank to which Henry belonged, but not of the character of the law in question, and the terms of the contract should not be construed to extend farther than to such laws and regulations, and to embrace others of a general character which the board of control could not lawfully enact. It is no answer to say that appellee is bound by Henry's contract with appellant, and that Henry had the right and power to stipulate that the certificate should be forfeited in case he violated any law which the board of control might thereafter enact, whether it had power to enact it or not. The question here is, not the power of Henry to make such a contract, but what is the meaning of the contract which he did make. It will be noticed that there is a difference between the terms of the applications and those of the certificate in the respect mentioned. The certificate makes the applications a part of the contract, but also binds Henry to a "full compliance with all laws governing this rank now in force or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or the board of control of ³⁴⁵ the endowment rank." This is the language of appellant in its certificate, and should be construed more strictly against it than against the insured. To confine it to laws which the board of control had power and could lawfully enact will give it all the force it is reasonably entitled to. To extend it further would be to construe it more strictly against the insured and his beneficiary. The by-law is a reasonable and wholesome one, and if properly enacted should be enforced.

It is contended that the action of the supreme lodge in adopting said report did not, under the constitution of said supreme lodge, have the effect of adopting or passing said by-law by the supreme lodge itself. This contention is based on provisions of such constitution, the most pertinent of which are as follows:

"Sec. 15. No proposition shall become a statute until it shall have passed three successive readings, the second and third of which shall not be had on the same calendar day.

"Sec. 16. The affirmative vote, by yeas and nays, of a majority of all the members of the supreme lodge shall be required for the final passage of a proposition.

"Sec. 18. The enacting clause of every proposition shall be as follows: Be it enacted by the supreme lodge Knights of Pythias,' and shall precede or be a part of the first section of such proposition."

By-laws of the general character of the one in question were by the constitution designated "statutes," and when merely proposed for enactment, "propositions." It is apparent that the supreme lodge did not observe these provisions of its constitution in adopting this by-law, if it did adopt it, but the appellant contends that the by-law was lawfully adopted, although not in the manner provided in the constitution. In this view we concur. The constitution was no part of the charter of the corporation, and was but a by-law under another name, and could not take from the lawfully constituted authorities ³⁴⁶ of the corporation the power inherent in it as a corporate body to adopt, from time to time, such other by-laws as its charter permitted and its necessities required. The same body that enacted the by-laws called the "constitution" had the power to alter, amend or repeal them, and to do so in any lawful manner. The majority of the corporate authorities cannot at one meeting pass a by-law taking away from their successors, acting within the charter and by a majority, the power to repeal or amend the by-laws of the corporation or to enact new ones. They may make rules and by-laws regulating their own proceedings and for their convenience, but a by-law otherwise lawfully adopted, of a general character like the one in question, is not rendered invalid because in adopting it the corporate authorities violated certain rules of procedure which they had previously prescribed. This precise question, involving the same by-law in controversy here, was fully considered by the supreme court of Mississippi in *Dornes v. Supreme Lodge etc.*, 75 Miss. 466, and the same conclusion reached. See, also, *Supreme Lodge v. Knight*, 117 Ind. 495; *Commonwealth v. Mayor*, 5 Watts, 152; *Angell and Ames on Corporations* 459; *Christ Church v. Pope*, 8 Gray, 140; *Sayre v. Louisville etc. Assn.*, 85 Am. Dec. 618, note; 5 Am. & Am. Ency. of Law, 2d ed., 88; 1 *Thompson on Corporations*, sec. 943.

William C. Henry, the insured, committed suicide on October 3, 1895—more than a year after this by-law was adopted by the supreme lodge. By force of his contract he and his beneficiaries

were bound by it, although it was adopted after he became a member and received his certificate. The trial court erred in instructing the jury to return a verdict for the plaintiff.

The judgments of the circuit and appellate courts are both reversed, and the cause will be remanded to the circuit court for further proceedings not inconsistent with the views herein expressed.

ASSOCIATIONS—BENEFIT SOCIETIES—DELEGATION OF POWERS.—The supreme lodge of a beneficial association, such as the Knights of Pythias, cannot delegate to a subordinate managing committee the legislative power vested by the charter in the supreme lodge alone. Hence, a by-law or regulation adopted by such committee undertaking to forfeit a member's rights in the event of his suicide is inoperative: *Supreme Lodge K. of P. v. Stein*, 75 Miss. 107; 65 Am. St. Rep. 589. See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 556; on the entire question.

ASSOCIATIONS—BENEFIT SOCIETIES—ADOPTION OF BY-LAWS.—Under a contract of insurance, issued by a mutual company, conditioned to be subject to any laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting the policy on account of suicide: *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203; 55 Am. St. Rep. 310, and note.

ASSOCIATIONS—BENEFIT SOCIETIES.—THE CONSTITUTION AND BY-LAWS of a voluntary association stand on the same footing. No provision in either is binding, unless it be in accordance with the law of the land and with public policy: See note to *Austin v. Searing*, 69 Am. Dec. 672. But see the note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 556.

SUPREME LODGE KNIGHTS OF PYTHIAS v. TREBBE.

[179 ILLINOIS, 348.]

ASSOCIATIONS—BY-LAWS—REPEAL.—The valid passage of a by-law by the supreme lodge of a benefit society in any mode not prohibited by its charter or general law is necessarily a repeal of any other mode previously prescribed by the same supreme lodge.

ASSOCIATIONS—BY-LAWS.—THE CONSTITUTION OF A VOLUNTARY ASSOCIATION is nothing more than a by-law which may be altered, abrogated, or repealed by the power enacting it, unless some higher rule restrains or prohibits a change or repeal.

ASSOCIATIONS—BENEFIT SOCIETIES — ENACTMENT OF BY-LAWS.—The adoption by the supreme lodge of a benefit society, by a viva voce vote, of a by-law passed by a subordinate lodge or board of control without authority, is a valid enactment of such law, although the constitution of such supreme lodge provides another method of enacting by-laws. The by-law thus enacted binds members whose contracts require compliance with all by-laws "now in force or hereafter enacted by such supreme lodge."

W. M. Hough, for the appellant.

M. Millard and F. C. Smith, for the appellee.

348 PHILLIPS, J. The appellee recovered a judgment for three thousand dollars against the appellant in the city court of East St. Louis, which, on appeal to the appellate court for the fourth district, was affirmed, and an appeal is prosecuted to this court.

The order of Knights of Pythias was incorporated in 1870 under the laws of the District of Columbia, as "The Supreme Lodge of the Knights of Pythias of the World." By an amendment to its certificate of incorporation in October, 1875, it was provided the supreme lodge should be and remain a body corporate for the term of twenty years. A further amendment, dated in March, 1882, authorized the establishment of the endowment rank, to be governed by such laws as to the said supreme lodge may seem proper. Subsequently, in June, 1894, by a special **349** act of Congress the Supreme Lodge Knights of Pythias was incorporated as a fraternal and benevolent association. The endowment rank was the insurance branch of the order, and it was provided that it should be governed by such laws as the supreme lodge may enact or authorize. The supreme lodge created the board of control, which was given entire charge of the endowment rank, and that board was authorized to establish a table of rates for insurance of its members, to make special assessments when necessary, and to make, alter, and amend all laws pertaining to the endowment rank, and to issue certificates therein.

At the eighteenth convention of the Supreme Lodge Knights of Pythias, held at Washington, D. C., August 28 to September 8, 1894, the board of control made a report of having adopted for the government of the endowment rank a law with reference to the suicide of one holding a certificate of insurance in the order. The law passed by the board was substantially as follows: "If the death of any member of the endowment rank heretofore admitted into the first, second, third, or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then, in such case, the certificate issued to such member, and all claims against said endowment rank on account of such membership, shall be for-

feited." The report was referred to a committee of the endowment rank, who reported they had "given the same careful consideration in every respect, and fully concur and approve of the legislation, in all details, enacted by said board for the government of the endowment rank." That report was subsequently adopted by the supreme lodge on a viva voce vote.

³⁵⁰ The board of control was in existence prior to the first day of January, 1889. On the nineteenth day of August, 1889, G. H. Trebbe filed an application to become a member of the endowment rank, and his application contained the following provision:

"I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed and this contract shall be controlled by all the laws, rules, and regulations for the order governing this rank now in force or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or submit to the penalties therein contained. To all of which I willingly and freely subscribe.

"Dated at East St. Louis this the nineteenth day of August, 1889.

"G. H. TREBBE."

The president of the board of control, on that application, issued a certificate, which contained the following provisions:

"This certifies that brother G. H. Trebbe received the obligation of the endowment rank of the Order of Knights of Pythias in section No. 324 on September 6, 1889, and is a member in good standing in said rank, and in consideration of the representations and declarations made in his application, bearing date of August 19, 1889 (which application is made a part of this contract), and the payment of the prescribed admission fee, and in consideration of the payment hereafter to said endowment rank of all assessments as required, and the full compliance with all laws governing this rank now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of \$3,000 will be paid by the Supreme Lodge of Knights of Pythias of the World to Matilda Trebbe, his wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct by change of beneficiary entered upon the records of the supreme secretary of the endowment rank, upon due notice of proof of death and good standing in the rank at the time of death and surrender of this certificate; provided, however, that the interest of any beneficiary, as desig-

nated by said brother, or in the interest of his or her heirs, shall cease and determine in case of the death of said beneficiary during the lifetime of such member, and in that case the benefit accruing under this certificate shall be paid as provided for in article 12, section 1, of the endowment ³⁵¹ rank constitution; provided further, that if, at the time of the death of said brother, the proceeds of one assessment on all members of the endowment rank shall not be sufficient to pay in full the maximum amount of endowment held under this certificate, then there shall be paid an amount, less ten per cent for expenses, equal to the proceeds of one full assessment on all remaining members of the endowment rank, and the payment of such sum to the beneficiary or beneficiaries mentioned shall be in full of all claims and demands under and by virtue of this certificate. And it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the law in force governing this rank, shall render this certificate and all claims null and void, and that the said supreme lodge shall not be liable for the above sum or any part thereof.

"In witness whereof we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World. Issued this 17th day of September, 1889, pp. xxvi, at Chicago, Illinois, and registered in book 2, folio 168.

[Seal]

"J. A. HINSEY,
Pres. Board of Control.

"Attest:

"W. B. Kennedy,

"Supreme Sec. Endowment Rank."

And the certificate was accepted by the applicant, as follows:

"I hereby accept this certificate of membership subject to all the conditions therein contained.

"G. H. TREBBE.

"Attest:

"Frank Martin,

"Sec. Section No. . . ., E. R."

The endowment rank was the insurance branch of the order, and the board of control was created by the supreme lodge and given entire charge of the endowment rank. It was authorized to make rates for insurance, make special assessments, and make, alter, and amend all laws pertaining to the endowment rank and to issue certificates therein. G. H. Trebbe had knowledge of that board and its powers when he applied for insurance

and took a certificate from its president. The application by him contained this provision: "This contract shall be controlled by all the laws, rules, and regulations for the order governing this rank now in force or that may hereafter be enacted by the Supreme Lodge Knights of ³⁵² Pythias of the World," et cetera. By the terms of the certificate of insurance it was provided that if compliance should be had with all laws "governing this rank now in force or that may hereafter be enacted," et cetera, payment was to be made, et cetera. Under the by-laws the board of control had the right to make, alter, and amend the law governing the endowment rank, and it being necessarily assumed that Trebbe had knowledge of the powers of that board, he took his certificate with notice of its powers.

Long after the issue of this certificate, and whilst the enactment of the board of control was in force, G. H. Trebbe did, on the seventh day of September, 1896, commit suicide. The beneficiary in the policy brought suit on the certificate, and, on trial before a jury, the court refused instructions, asked by the defendant, that if they believed from the evidence that the death of G. H. Trebbe resulted from self-destruction, whether sane or insane at the time, they must find for the defendant, and gave an instruction for the plaintiff that the jury must find the issue for the plaintiff and assess her damage at three thousand dollars. To the refusal to instruct as asked by the defendant, and giving the instruction asked by the plaintiff, the defendant excepted.

It is apparent that in the organization of this association a provision was made for the organization of a constitution regulating and governing the order itself. By the organization of the endowment rank it embodied and embraced the insurance part of this order. The board of control was given control of the endowment rank with reference to insurance and with reference to rates of insurance, and had the right to amend, change, or make additional laws for the government of the same. When the board of control enacted a statute under the terms and provisions of the powers conferred upon it by the supreme lodge, and the supreme lodge at a meeting had presented to it a report of the committee of the endowment rank, stating that it, the board of control, had ³⁵³ enacted a statute for the government of the endowment rank, and the supreme lodge adopted and approved, by a viva voce vote, the report of the committee of the endowment rank which showed the adoption of the re-

port of that committee, it was the enactment by the supreme lodge of a statute for the government of that body.

In *Dornes v. Supreme Lodge Knights of Pythias*, 75 Miss. 466, it was held: "The valid passage of a law by the supreme lodge in any mode not prohibited by its charter or the general law of the land is necessarily a repeal of any other mode previously prescribed by the same supreme lodge—the same source of power. The authorities make this perfectly clear. In *Supreme Lodge v. Knight*, 117 Ind. 495, it is said: 'Charters are not created by the act of the corporation or association, but are granted by the sovereign power of the state. A constitution of a voluntary association or a corporation is nothing more than a by-law under an inappropriate name. The power that can enact a by-law, whether called a constitution or not, can alter or abrogate it, unless some higher rule restrains or prohibits a change or repeal. When the authorities speak of a charter they mean an essentially different thing from a law or constitution of the association's own creation. What counsel call a charter is nothing more than a code of laws established, not by the sovereign power of the government, but by the creature of that power—the corporation or association. The most that can be justly said is, that the later by-laws are in conflict with the earlier. There is, therefore, no clashing between corporate utterances and charter provisions.' And this was said by Elliott, C. J., speaking of provisions of the supreme constitution of the order itself. In *Richardson v. Union Congregational Soc.*, 58 N. H. 188, the court say: 'Complaint is made that the amendment of by-law 13, requiring a two-thirds vote for the admission of new members, was not properly and legally enacted because its passage was not obtained by a vote of two-thirds of those present, ³⁵⁴ according to by-law 12, requiring a vote of two-thirds of the members present to alter or amend the by-laws of the society. . . . By-law 12 was not part of the charter or constitution of the society and not a law for the guidance of its officers and agents. It was an enactment made by one meeting of the society to govern the proceedings of future meetings, and was inoperative beyond the pleasure of the society acting by a majority vote at any regular meeting. The power of the society, derived from its charter and the laws under which it was organized, to enact by-laws is continuous, residing in all regular meetings of the society so long as it exists. Any meeting could, by a majority vote, modify or repeal the law of a previous meeting, and

no meeting could bind a subsequent one by irrepealable acts or rules of procedure. The power to enact is a power to repeal, and a by-law requiring a two-thirds vote of members present to alter or amend the laws of the society may itself be altered, amended, or repealed by the same power which enacted it: Angell and Ames on Corporations, 450; Commonwealth v. Mayor etc., 5 Watts, 152, 155; Christ Church v. Pope, 8 Gray, 140, 142. The society, by a majority vote, might amend or repeal by-law 12. By a like vote they might adopt any mode for the admission of members.' This is directly in point. Mr. Thompson in Commentaries on the Law of Corporations, volume 1, sec. 943, lays down the same rule, saying: 'If the charter is silent as to the formalities to be observed, a by-law may be adopted by acts as well as by words.'

It was held in State v. Grand Lodge A. O. U. W., 70 Mo. App. 456: "The ruling in the Davenport case, and its approval and adoption by the grand lodge and the subsequent recognition of the rule by the grand lodge, can be taken in no other light or be reconciled upon any other hypothesis than the adoption of the ruling as a rule of the order. This conduct and these acts of the grand lodge are irrefragable proof of the adoption ³⁵⁵ of the law, which it might do as well by acts and conduct as by a formal and express adoption of the by-law: (Angell and Ames on Corporations, sec. 328; Lockwood v. Mechanics' Bank, 9 R. I. 308; 11 Am. Rep. 253.) This law having been adopted, the second question is, Was the defendant, he having become a member of the order and received his beneficiary certificate prior to its adoption, amenable to it? The right to amend its by-laws is necessarily inherent in a corporation of this kind, and its members might reasonably expect that they would be amended: Ellerbe v. Faust, 119 Mo. 653; Schrick v. St. Louis etc. Building Co., 34 Mo. 423; Allen v. Life Assn. of America, 8 Mo. App. 52."

In Supreme Lodge etc. v. McLennan, 171 Ill. 417, the question was presented on demurrer to a plea, and it was held that the provisions of the application for certificate by which it was provided that the applicant would be bound by all laws then in force or which might be thereafter enacted by the supreme lodge would be binding, could not be pleaded, as the agreement averred that the "board of control of the endowment rank of the supreme lodge adopted the by-law so relied upon."

The board of control having enacted a law for the government of the endowment rank, which was reported to the supreme

lodge by a committee of the endowment rank, and the supreme lodge having adopted the report and approved the law, it must be held that the statute thus reported by the board of control was enacted by the supreme lodge. To hold otherwise would be to hold that one legislative body might limit the power of another legislative body with equal powers, and prevent the enactment of laws by a body of equal authority.

We hold that the exercise of the power conferred on the board of control for the government of the endowment rank, authorizing them to enact, amend, and annul laws, when acted on by that board and reported to the supreme lodge and approved by it, was the enactment of the particular provision involved in this case with reference to ³⁵⁶ a bar of a right of action where death resulted from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be superinduced by the use of intoxicating liquors, narcotics, or opiates, or at the hands of justice.

Under the replications to the pleas and under the evidence appearing in this record no question is presented for the consideration of this court as to whether the character of insanity was such that the deceased, at the time of committing suicide, was unconscious of the act, or whether the degree of insanity would in any manner cause this by-law to be of no effect in barring the right of recovery. As tried, the case presented to this court is simply the case of the certificate and the by-law and an act of self-destruction.

It was error in the trial court to refuse the instructions asked by the defendant, and it was also error to give the instruction asked by the plaintiff.

The appellate court erred in affirming the judgment of the city court of East St. Louis. The judgment of the city court of East St. Louis and the judgment of the appellate court for the fourth district are each reversed and the cause is remanded for further proceedings.

ASSOCIATIONS. BENEFIT-BY-LAWS.—THE CONSTITUTION of a benefit society, if no part of its charter, has only the effect of a by-law, and cannot take from the rightfully constituted authorities of the society their inherent power to adopt, from time to time, such other by-laws as its charter permits or necessity requires: *Supreme Lodge K. of P. v. Kutscher*, 179 Ill. 340; ante, p. 115, and note thereto collecting former cases. See especially the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 556.

BASTRUP v. PRENDERGAST.

[179 ILLINOIS, 553.]

MECHANICS' LIENS—ESTOPPEL AGAINST WIFE.—If a wife, with knowledge that her husband has made false representations as to the ownership of property and has contracted in his own name for the erection of buildings thereon, assists in procuring the work to be done under the contracts, without disclosing to the contractor her title to the property, which is of record, she is estopped to assert her title for the purpose of defeating a mechanic's lien arising out of such contract.

MECHANICS' LIENS—WANT OF DESCRIPTION OF PROPERTY IN CONTRACT.—The mere omission of a description or designation of the property in a building contract cannot defeat a mechanic's lien otherwise established when the notice, or claim of lien, filed for record properly describes the property, and all of the interested parties understood what property was referred to in the contract, and the material was furnished and the building erected upon that understanding.

MECHANICS' LIENS—FLATS AS ONE BUILDING.—Flats built on adjacent lots belonging to the same owner are one building, for the purpose of a mechanic's lien, although the division wall rises above the roof, and there are separate entrances, if they are erected as one structure, under one contract, at the same time, heated with one furnace, and a porch extends across the entire rear of the structure with one continuous and unbroken roof.

R. Prendergast and Bastrup & O'Neill, for the appellants.

Masterson & Haft, F. A. and H. F. Pennington, G. Langhenry, and J. F. Dillon, for appellees.

554 CARTER, C. J. With proceedings to enforce mechanics' liens instituted by the appellees and others in the circuit court of Cook county, a bill afterward filed by the appellants in the superior court was consolidated, and the two causes proceeded to final decree in the circuit court as one case. In the final decree, it was found that as to the claims of the appellees in controversy here appellees were not entitled to any lien, but that appellants had a lien on the property to the extent of their mortgage debt. The appellees took their appeal to the appellate court, where the decree was reversed and the cause remanded, with directions to enter a decree in accordance with the prayer of the pleadings of the claimants of mechanics' liens for the amount found due them and of the dates found by the circuit court, thus establishing their liens which had been denied by the circuit court and fixing the amounts due as found by that court. The effect of this judgment **555** is to give appellees precedence over the mortgage lien of the appellants.

If appellees were entitled to a lien at all, they were entitled

to a preference over appellants, inasmuch as the mortgage was given after the mechanics' liens attached. Appellants, therefore, have the right to insist, on this their appeal, that appellees have no lien. These mortgagees are the only appellants here, the owners of the property having acquiesced in the judgment of reversal.

Catherine McNally was the owner of the property, which consisted of two lots in Chicago, together having a frontage of forty-eight feet and seven and three-fourths inches on Fifty-fifth street and extending back on Wright street one hundred and forty feet, and the public records showed title in fee in her. She and her husband, John McNally, resided in a frame house on these lots as their home. In the latter part of the year 1893 appellee Norton prepared plans, at the request of John McNally, for a building covering both lots, to be used as stores below and flats above. These plans were shown and explained to Catherine McNally by Norton, the architect, at the request of John McNally. She decided that the building would be too expensive, and the plans were afterward, in January, 1894, changed to meet her views, so as to provide for a smaller building covering the front part of the lots and extending back only fifty-five feet and six inches. For the construction of this building John McNally entered into contracts under seal in his own name with various contractors and mechanics, including the appellees, except Norton, in which contracts McNally described himself as owner, but the property was not therein in any way described or located. Before the construction of the building was entered upon, and on February 13, 1894, Catherine McNally made a written application to Loeb & Gatzert for a loan of thirteen thousand dollars, to be secured by a deed of trust on the premises, the money to be used in the erection of the building, and stating that the money might be paid out by Loeb & Gatzert, at their option, for ⁵⁵⁰ labor, materials, et cetera, and if the amount should prove insufficient for the erection of the building she would supply the deficiency from her own funds. In this application she described in detail the character of the building to be erected, stating also that it was to be used as a residence for herself and her husband. The holders of the obligations for this loan were not parties to the suit, and it does not appear what amount of money was advanced upon it, except that they advanced one thousand dollars to Burkhardt & Sons and about four hundred dollars to Norton, and this loan, or the application for it, is

important here only as tending to connect Catherine McNally with the construction of the building, and as bearing upon the allegation that she is estopped by her conduct from claiming that her said property is not subject to the liens sought to be established and enforced. The frame dwelling occupied by Catherine and John McNally was moved to the rear of the lots and faced on Wright street, and was occupied by them during the construction of the building in front. Without rehearsing the evidence, it shows that she observed the progress of the work, frequently inspecting it; that important changes were made and contracts entered into in accordance with her directions, and there can be no doubt, when all the evidence is considered, that she fully understood and authorized all that was being done by the appellees in doing the work and furnishing the materials for which the liens are claimed. John McNally was insolvent, and she knew it, and knew the building could be paid for in no other way than by moneys secured by liens upon the property. But while the evidence shows that appellees did not in fact know that she, and not her husband, was the owner of the lots, it does show that she was such owner and that it so appeared from the records of deeds in the recorder's office of Cook county, and that appellees made no examination of such records until after the work was done. Inasmuch as the contracts were with John McNally only, and under his seal, the only question, ⁵⁵⁷ as we view the case, is whether or not Catherine McNally is estopped from claiming title in herself, as against appellees' right to liens on the property.

The contracts disclosed no question of agency, and Catherine McNally was not in any way mentioned in them. She could not sue or be sued on them as an undisclosed principal, and as the law in force when these liens are claimed to have attached required that the contract, whether expressed or implied, should be made with the owner of the property, her property was not liable, under the contracts, on proof merely that she was principal and that her husband acted as her agent: *Walsh v. Murphy*, 167 Ill. 228, and cases there cited. The proof given was inadmissible to show that in making the sealed contracts with appellees John McNally acted as the agent of his wife, the owner of the property, for the purpose of holding her liable as principal, but in so far as it tended to prove that she aided and abetted John McNally in holding himself out to appellees as the owner of the property and induced them to act upon that

representation, thus operating to estop her from claiming title as against appellees, it was admissible. But the mere fact that she stood by and permitted her husband to construct the building on her property, and to enter into contracts for the purpose in his own name without objection on her part and without informing appellees that she was the owner of the lots, would not, of itself, if she did not know that he represented himself as owner, show any fraudulent conduct on her part from which an estoppel would arise: *Campbell v. Jacobson*, 145 Ill. 389. Her title was of record, and if the appellees saw proper to improve her property under contracts with her husband without examining the records or without inquiring of her as to the title, she would not be estopped from asserting her title as against their claim for a lien for the improvements, unless her conduct was such as to amount to a fraud, actual or constructive, upon appellees in claiming ⁵⁵⁸ title in herself after the work was done. Thus, in *Campbell v. Jacobson*, 145 Ill. 389 (a case similar, in many respects, to this except as to allegations of fraud,) where it was held that no lien attached to the wife's land, it was said that there was nothing in the conduct of Mrs. Jacobson which called for the application of the doctrine of estoppel, and that "if she had withheld her deed from record until after the contract had been entered into, as was the case in *Schwartz v. Saunders*, 46 Ill. 17, thus placing it in the power of her husband to hold himself out to the world as the owner of the property, or if she had fraudulently permitted her husband to represent himself as such owner, as appeared to be the case in *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, the case would doubtless have been different. But nothing of that kind is shown." In that case there was nothing in the pleadings or the evidence under which the doctrine of estoppel could be applied, and in this respect that case is different from this. Here it was a question of fact pertinent in the case whether or not she had knowledge that John McNally held himself out to the appellees as the owner of the property, and permitted him to contract as owner with appellees for the work and materials to be used in constructing the building on her property. Both husband and wife resided upon the premises, and we are of the opinion that the evidence is sufficient to charge her with knowledge that in making his contracts with the builders her husband represented himself as owner of the property and that they relied upon that representation in doing their work and furnish-

ing the materials. While an examination of the public records would have disclosed that the title of record stood in her, still it cannot be doubted that had she informed appellees that her husband was the owner of the property they would have been justified, as against her, in relying upon her statement without examining the records, and she would have been estopped, after the work was done, from asserting her own title as against her claim for a lien. ⁵⁵⁹ It was a fraud upon appellees for John McNally to obtain their work and materials in the construction of the building upon his wife's land under representations that he was the owner, and if she, with knowledge of such false representations of ownership, assisted in procuring the work to be done under the contracts without disclosing to appellees her title to the property, she was as much a party to the fraud as if she had falsely stated to them that her husband was the owner of the property.

Appellants say that appellees should have examined the records or inquired of Catherine McNally as to the ownership of the property. This would ordinarily be correct, but in this case such action was rendered unnecessary by the false representations of McNally, connived at by his wife. If husband and wife are in possession of land, the title whereof is in the wife, and a third person is about to purchase from the husband upon his representation that he is the owner, and the wife, knowing this, stands by and encourages the sale and urges the purchaser to buy, and the purchaser, relying upon such representations, buys and takes title from the husband without knowing the title is in his wife, she would be estopped from setting up her own title against the purchaser, for otherwise she would be perpetrating a fraud upon him, and this would be so even if her title appeared of record. Thus it is said in 2 Herman on Estoppel and Res Judicata, section 964: "When a title has been once duly recorded no responsibility will arise from a failure to take further or immediate steps to warn subsequent purchasers, who may fairly be presumed to have taken the means pointed out by law and acquired all the knowledge which it is important for them to have. But this is applicable only in the case where the foundation of the estoppel is in silence or acquiescence, for where the owner concurs in a sale by participating in it at the time, it becomes his own act, and he certainly cannot be allowed to make his own good faith a reason for throwing his ⁵⁶⁰ loss upon third persons who are equally innocent." And

the case is, of course, stronger where the owner is guilty of fraud, actual or constructive. And in *Fisher v. Mossman*, 11 Ohio St. 42, it was said if a mortgagee of real estate whose mortgage was of record stood by at a sheriff's sale of the property and kept silent as to his lien he would not be estopped, but the case would have been different if he had said or done anything to deceive or mislead the purchaser. Also in *Hill v. Blackwelder*, 113 Ill. 283, this court said that the rule that the estoppel would not arise where the title of the party sought to be estopped appeared of record, applies "only in cases where the foundation of the estoppel is in silence, and omission to give notice of one's right, and not in a case where the landowner has actively encouraged and induced the injured party to act."

In *Anderson v. Armstead*, 69 Ill. 452, this court said: "The law is familiar that where the owner of property holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent parties are thus led into dealing with such apparent owner or person having the apparent power of disposition, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power he caused or allowed to appear to be vested in the party upon the faith of whose title of power they dealt." It is true, as said by appellants, that the principal ground on which it was held in that case that the wife was estopped was that her deed, dated shortly before the contract for the work, was not filed for record until four days after the contract was made, and that she did not disclose her title, although she knew of the work as it progressed and received the benefit of it, while in the case at bar Catherine McNally ⁵⁶¹ had owned the property for many years and it so appeared from the public records. It need not be stated that estoppel by conduct does not rest on any specific fact or facts, but will arise from any act of conduct of the party sought to be estopped which justifies the application of the general principle.

It is contended, however, that there is no evidence that Catherine McNally knew that her husband held himself out as owner, but we are of a different opinion. It is said, also, that the evidence shows that at least one of the appellants testified that he did not rely on her for payment but relied upon her husband.

If he relied on ownership in the husband, as the contract represented, it would not be expected that he would rely on the wife, and there was no testimony that appellants did not rely upon their right to a statutory lien upon the property.

It is next said that the property was not described or located by the contract, and the right to a lien must fail for that reason. It was alleged in the pleadings that the contract was made with reference to the lots in question, and the evidence supports the allegations. There was no contention to the contrary, either in the pleadings or in the evidence. All the parties in interest so understood, and the material was furnished and the house was built on the strength of that understanding, and the notice or claim for a lien filed for record properly described the property. We cannot hold, under the circumstances, that the mere omission of a description or designation of the property in the contract can defeat a lien otherwise established. All the parties in interest interpreted the contract as referring to this property where the McNally lived and of which John McNally claimed to be the owner. The case, in this respect, is distinguishable from *Wendt v. Martin*, 89 Ill. 139, and the view we have taken finds support in *Martin v. Eversal*, 36 Ill. 222, *Power v. McCord*, 36 Ill. 214, and *Clark v. Manning*, 90 Ill. 380.

⁵⁶² The next point made by appellants is, that the lien cannot be established or enforced because the labor was done and materials furnished on two different buildings, each under a different roof, located on a different lot from the other and divided by a partition wall rising above the roof, there being no apportionment in the claims for liens, nor in the pleadings and evidence, as to the amount due on the separate buildings. The so-called "buildings" were erected as one structure, located on the corner of Fifty-fifth and Wright streets. The work on the whole progressed together under the same contract, with the same materials. The side on Wright street was more expensively and elaborately finished than the other. There were separate entrances in front. There was a door in the partition wall in the basement, and through this opening steam pipes passed so as to heat the entire structure with one furnace. At the second floor there was a jog in the partition wall (which wall so far was upon the lot line between the two lots) so as to form a small court, into which windows opened from each side. There was a rear porch extending across the entire structure with one continuous and unbroken roof. Under this evidence

we are of the opinion that no apportionment was necessary, and that the structure must be regarded as one building, and not two separate and distinct buildings.

We find no substantial defects in the statements for lien filed by the respective claimants and their verification, and can not hold with the contention of appellants that appellees failed to comply with the statute in this respect.

We are of the opinion that the judgment of the appellate court is correct, and it will therefore be affirmed.

MECHANICS' LIENS—ESTOPPEL AGAINST WIFE.—If a husband enters into a contract for the erection of a building on his wife's land, with her knowledge, she participating in conversations between her husband and the contractors relative to the work during the time it is being done, and making no objection at any time, such land is liable for mechanics' liens arising out of the work done: *Jobe v. Hunter*, 165 Pa. St. 5; 44 Am. St. Rep. 639; *Spears v. Lawrence*, 10 Wash. 368; 45 Am. St. Rep. 789; *Bodey v. Thackara*, 143 Pa. St. 171; 24 Am. St. Rep. 526; *Bevan v. Thackara*, 143 Pa. St. 182; 24 Am. St. Rep. 529. Contra, *Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212; 59 Am. St. Rep. 174; *Hoffman v. McFadden*, 56 Ark. 217; 35 Am. St. Rep. 101.

MECHANICS' LIENS—DESCRIPTION OF PROPERTY.—A description of property sufficient for identification is indispensable to a mechanic's lien: *Maynard v. East*, 13 Ind. App. 432; 55 Am. St. Rep. 238, and note. But the insufficiency of the description of the property in one part of a mechanic's lien claim is cured by a description in correct form in a subsequent part of such claim: *Whittier v. Stetson etc. Co.*, 6 Wash. 190; 36 Am. St. Rep. 149.

MECHANICS' LIENS—DISCONNECTED BUILDINGS.—A claim of lien can be filed and asserted upon several disconnected buildings without there being any account of the amount of material furnished each: *Salt Lake etc. Co. v. Ibex Mine etc. Co.*, 15 Utah, 440; 62 Am. St. Rep. 944, and note. The contract must be single and entire in such a case: *Maryland Brick Co. v. Spilman*, 70 Md. 337; 35 Am. St. Rep. 431. But see *Wilcox v. Woodruff*, 61 Conn. 578; 29 Am. St. Rep. 222, for a contrary rule. See, also, *Chapin v. Persse etc. Works*, 30 Conn. 461; 79 Am. Dec. 263, and extended note thereto.

YOUNG MEN'S CHRISTIAN ASSOCIATION GYMNASIUM COMPANY v. ROCKFORD NATIONAL BANK.

[179 ILLINOIS, 599.]

NEGOTIABLE INSTRUMENTS—PURCHASE OF OVERDUE NOTES INDORSED IN BLANK—PROTECTION AGAINST THIRD PARTIES.—A bank advancing money to the holder of overdue negotiable notes indorsed in blank by the payee without notice that they are held as collateral security is protected against latent equities in third parties.

NEGOTIABLE INSTRUMENTS—NOTICE THAT NOTES ARE HELD AS COLLATERAL.—The mere fact that negotiable notes indorsed in blank by the payee are overdue is not sufficient to charge a bank advancing money thereon to the holder with constructive notice that the notes are held merely as collateral security.

A. D. Early, W. Lathrop, and Fisher & North, for the appellants.

R. K. Welsh and Works & Hyer, for the appellee.

601 WILKIN, J. The circuit court of Winnebago county granted the prayer of a bill by the Young Men's Christian Association Gymnasium Company, and of a cross-bill by Warren Gilmore, against appellee, for an injunction restraining it from collecting certain promissory notes and to compel it to pay over money received on a certain other note. The appellate court reversed that decree and remanded the cause with directions, and to reverse that judgment this appeal is prosecuted.

There is no dispute as to the facts. The gymnasium company, having arranged with Marcus S. Parmele, of the firm of Knapp & Parmele, for a loan of four thousand dollars, executed its five promissory notes, dated September 3, 1891, due three years after date, with interest at seven per **602** cent per annum, payable semi-annually at the office of Knapp & Parmele—one for two thousand dollars, payable to the order of Warren Gilmore; one for six hundred dollars, to the order of Elizabeth L. Stires; and one for six hundred dollars and two for four hundred dollars each, to Knapp & Parmele or bearer. The payment of each of these notes was guaranteed by William H. Worthington, E. M. Aikin, Marcus S. Parmele, Charles E. Sheldon, and F. G. Hogland, officers and stockholders in the gymnasium company, and the notes were placed in the hands of Parmele with twenty other promissory notes, each for two hundred dollars, dated August 5, 1891, due three years after date, with seven per cent interest, payable semi-annually to the order of the gymnasium company, six of which were severally signed by John G. Penfield, P. R. Walker, C. R. Wise, H. H. Robinson, Charles E. Sheldon and Anton Neumeister, stockholders in said company, the remaining fourteen being executed by other persons, also stockholders. Each of these two hundred dollar notes was indorsed by the payee, the gymnasium company, in blank, and a receipt taken from Knapp & Parmele therefor, as follows:

“Rockford, Ill., Sept. 3, 1891.

“Received of the Young Men’s Christian Association Gymnasium Company notes as follows: [Here follows a description of each of the twenty notes] indorsed by William H. Worthington, president, and E. M. Aikin, secretary and treasurer. Above notes held by undersigned as collateral security for the payment of notes as follows: [Here follows a description of the five notes.] When said notes last mentioned are paid and this receipt returned, said collateral security will be delivered up.

“KNAPP & PARMELE.”

The six hundred dollar note payable to Knapp & Parmele was indorsed by them to Mrs. Katherine Scott and one of the four hundred dollar notes to Mary R. Tanner, the other being retained by Parmele. With these notes the desired four thousand dollar loan was obtained and the money paid over to the gymnasium company by Parmele. Although the name of the firm of Knapp & Parmele appears in connection with the procurement of this loan, the transaction throughout was ⁶⁰³ with Marcus S. Parmele individually, and he retained possession of both the principal and collateral notes until September, 1896, when he delivered the six first described, for two hundred dollars each, indorsed in blank, as above stated, to the defendant bank as security for a loan procured by him. These notes were then past due and unpaid except as to the interest, which was indorsed upon each as paid to August 5, 1896. The bank had no actual notice of the capacity in which Parmele held them, and received them in the usual course of business without inquiry.

On October 2, 1896, Parmele made a general assignment for the benefit of his creditors to Joel B. Whitehead, as assignee, and turned over to him the four hundred dollars principal note remaining in his hands and all the collaterals except the six transferred to the bank. On October 6, 1896, the bank collected of Neumeister two hundred and two dollars and ninety-two cents—the amount then due on his note—and afterward brought suit against John G. Penfield on his note. The five principal notes and each of the collateral notes, except the one collected, remain wholly unpaid. Both the original and cross-bills seek to restrain the defendant from collecting the five remaining notes in its hands and to require it to pay to the gymnasium company the amount of the one collected. The right to this relief is predicated upon the theory that the assignment of said

notes to the defendant by Parmele was without authority, and vested in it no title as against complainants.

The proposition that a pledgee or holder of negotiable paper as collaterals, in the absence of express authority, has no legal right to negotiate the same, may, as a general rule, be granted; but unless the bank, when it took the notes in question, was chargeable with notice that they were held by Parmele merely as collaterals, the rule cannot affect the decision of this case. If it was so chargeable, it must be upon the ground that, having required them after due, it was bound to take notice of the rights of complainants, which is the principal ⁶⁰⁴ question upon which the decision must turn and to be hereafter considered.

That class of cases cited by counsel for appellants in which the assignor of commercial paper obtained possession without any right or legal title thereto, as by theft, finding, or fraud, are not in point here. In those cases, the rule that an owner cannot be deprived of his property without his consent obtains, subject, however, to the exception in favor of the negotiability of such instruments, that if they are transferred to an innocent purchaser for value before due, without any notice of the absence of title in the assignor, the transferee will obtain the legal title even against the true owner, but if the transfer is after maturity no title whatever will pass, no matter how innocently or with what good faith the assignee acquires the instrument. In the one case the purchaser gets a better title than his assignor had, while in the other he does not. And it had been held in cases falling within the latter rule that the assignee takes the overdue paper subject not only to the equities of the maker, but also of those of the true owner or other third parties having an interest therein, the question in such cases being not one of negotiability but of legal title. *Henderson v. Case*, 31 La. Ann. 215, cited and quoted from in the argument, was a case of that kind, and the court said: "We do not think that the authorities cited by the defendant, to the effect that no collateral equities can effect an assignment of commercial paper transferred after maturity, can be applied to the case where there is a total want of right in the transferer." The same distinction exists in the other cases of this class referred to by counsel.

In the case at bar, the six notes in suit were placed in the hands of Parmele, bearing the indorsement of the payee, without any evidence whatever indorsed thereon or attached there-

to that they were to be held by him otherwise than as absolute owner. He was thus clothed with every indicia of the legal title and absolute ownership ⁶⁰⁵ by the party to whom they were made payable. It is well settled that such instruments indorsed in blank pass by delivery, the indorsement being treated as made to each subsequent transferee; also, that the negotiability of commercial paper does not cease with its maturity, but may still be negotiated by indorsement. We are unable to find any fact in this record with which appellee was chargeable when it obtained these notes, or any principle of law which can be said to distinguish it from the ordinary assignee of negotiable bills and notes after maturity.

The inquiry then must be, Is the fact that such paper is past due when transferred, sufficient, of itself, to charge the taker with notice of the latent equities of third parties? Our statute fixes the rights of the maker in such cases upon clear principles of justice, without materially affecting the negotiability of commercial instruments; but to extend the same protection to whoever may have acquired some collateral interest in the paper, in the absence of actual notice of the same to a transferee, would be to charge him with knowledge of a fact not within his power of ascertainment and practically destroy the negotiability of overdue instruments. While the question has never been before us in the present form, it is not altogether a new one. We have frequently held that the assignee of a mortgage holds it, and the indebtedness secured by it, subject to the same defenses which might have been urged against the mortgagee. In *Olds v. Cummings*, 31 Ill. 188, it was held that such an assignee was, nevertheless, protected against the latent equities of third persons, and in *Silverman v. Bullock*, 98 Ill. 10, 20, we said: "The rule in *Olds v. Cummings*, 31 Ill. 188, is a reasonable one, and can readily be observed. Persons dealing in such securities can, without difficulty, inquire of the makers if any defenses exist against them, but more than that it is not practicable to do. Of course, it would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject matter of ⁶⁰⁶ the assignment, and the adoption of a rule that would let in latent equities to prevail against the assignee would be to ensnare dealers in such securities." To the same effect are the cases of *Himrod v. Gilman*, 147 Ill. 293, and *Humble v. Curtis*, 160 Ill. 193.

Other courts and text-writers have, so far as we can ascertain,

applied the same rule to negotiable securities assigned after due. In *National Bank of Washington v. Texas*, 20 Wall. 89, the supreme court of the United States says: "The transferee of overdue negotiable paper takes it liable to all the equities to which it was subject in the hands of the payee. But those equities must attach to the paper itself, and not arise from any collateral transaction." And again: "The position of the transferee must be at least as favorable as that of the assignee of a chose in action. There the assignee takes subject to the equity residing in the debtor, but not to an equity residing in a third person against the assignor." And in support of the doctrine thus announced the language of Chancellor Kent is cited, as follows: "The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee, but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the assignee, without notice, of a chose in action was preferred in the late case of *Redfearn v. Ferrier*, 1 Dow, 50, to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that if this were not so no assignment could ever be taken with safety."

Upon the contention of appellants that appellee could take no better title than Parmele himself had, *Lee v. Turner*, 89 Mo. 494; *Hill v. Shields*, 81 N. C. 253; 31 Am. Rep. 499; *Bradford v. Williams*, 91 N. C. 7, and *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329; 7 Am. Rep. 341, cited by counsel for appellee against the position, ⁶⁰⁷ are in point. In the first case the supreme court of Missouri said: "But we do not see that the doctrine that the transferee of negotiable paper, to whom it is transferred after maturity, acquires nothing but the actual right and title of the transferrer, should control the disposition of this case. The note is assignable. If the true owner of a negotiable note overdue, or of a nonnegotiable note, clothes another with the usual evidences of ownership, . . . and third persons are led into dealing with such apparent owner, they will be protected in their dealings." And in the *McNeil* case, passing upon the same question, the court used this language: "It must be conceded that, as a general rule applicable to property other than negotiable securities (meaning, of course, before maturity), the vendor or pledgor can convey no greater

right or title than he has. But this is a truism predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle that where the true owner holds out another or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

Story on Promissory Notes, section 178, states what we conceive to be the law of this case, as follows: "In general, it may be stated that a transfer may be made any time while the note remains a good, subsisting, unpaid note, whether it be before or after it has arrived at maturity. But the rights of the holder against the antecedent parties may be most materially affected by the time ⁶⁰⁸ of transfer. . . . If the transfer is after the maturity of the note, the holder takes it as a dishonored note, and it is affected by all the equities between the original parties, whether he has any notice thereof or not. But when we speak of equities between the parties, it is not to be understood by this expression that all sorts of equities existing between the parties from other independent transactions between them are intended, but only such equities as attach to the particular note, and, as between those parties, would be available to control, qualify, or extinguish any rights arising thereon. (The true test to determine whether a note is subject to an equity set up by the maker is this: Could the payee, at the time he transferred the note, have maintained a suit upon it against the maker if it had then been mature.) Still, however, subject to such equities, the holder, by indorsement after the maturity of the note, will be clothed with the same rights and advantages as were possessed by the indorser, and may avail himself of them accordingly." To the same effect are 2 Randolph on Commercial Paper, sec. 675; Daniel on Negotiable Instruments, sec. 726b; 2 Parsons on Bills and Notes, 42, et seq.; Tiedeman on Commercial Paper, sec. 295.

In *Eversole v. Maull*, 50 Md. 95, the appellant, Eversole, be-

ing the payee of a promissory note made by Caskey, indorsed it generally and delivered it to one Frame, an attorney, for collection. Frame transferred it to the appellee, Maull, after maturity, for value, without notice of the purpose for which he held it. The court sustained the title of Maull against the claim of Eversole on the authority of the foregoing text by Judge Story and its own former decisions based thereon. The case seems to have received careful consideration, and the opinion of the court ably disposes of every substantial question raised in this case.

We have duly considered the cases referred to and quoted from by counsel in their extended argument on behalf of appellants, and we find them distinguishable ⁶⁰⁹ from this case either in the fact that the controversy arose between the maker of the instrument sued on and a transferee, or that the assignor had not the legal title to the paper when he transferred it. But if this were not so, we are clearly of the opinion that the claim of the appellee bank that it took these notes without becoming chargeable with notice of the rights of the complainants below is abundantly sustained by authority and is in consonance with our own decisions. As was said by the supreme court of Maryland in *Eversole v. Maull*, 50 Md. 95: "The equitable principle which underlies this doctrine and which is universally admitted to be just and sound, is, that if a loss occurs by which one of two innocent persons must suffer, that one should sustain the loss who has most trusted the party through whom the loss came."

The judgment of the appellate court will be affirmed.

NEGOTIABLE INSTRUMENTS—RIGHTS OF PURCHASER OF OVERDUE NOTES.—If a negotiable note is transferred after it becomes due, the assignee takes it subject to all equities and defenses as between the maker and payee, but in such case it is only subject, in the hands of the indorsee, to such equities and defenses as are connected with the note itself, and not such as grow out of transactions disconnected therewith: *Kelly v. Staed*, 136 Mo. 430; 58 Am. St. Rep. 648, and note; *Davis v. Noll*, 38 W. Va. 66; 45 Am. St. Rep. 841; and note; *Carpenter v. Greenop*, 74 Mich. 664; 16 Am. St. Rep. 662, and note. See, also, *Loëwen v. Forsee*, 137 Mo. 29; 59 Am. St. Rep. 489.

CASES
IN THE
SUPREME COURT
OF
IOWA.

McMAHON v. DUBUQUE.

[107 Iowa, 62.]

DAMAGES—MEASURE OF—DESTRUCTION OF PROPERTY HAVING NO MARKET VALUE.—For the destruction of household goods and wearing apparel having no recognized market value, the measure of damages is their actual value, which may be determined by evidence of their original cost, the extent of their use, and their condition at the time of destruction.

WITNESSES—MATTERS OF OPINION.—In determining the condition of a house at the time of its destruction, whether or not it was in good repair, a witness may describe the house in detail, but he should not be permitted to testify whether or not the house was in good repair, such testimony being merely an opinion.

DAMAGES—MEASURE OF—DESTRUCTION OF DWELLING-HOUSE.—The measure of damages for the destruction of a dwelling-house by fire is its actual and not necessarily its market value.

WITNESSES—TESTIMONY OF EXPERTS.—In an action for damages occasioned by fire ignited from sparks escaping from a road-roller engine, it being alleged that the defendant was negligent in failing to provide such engine with a spark arrester, expert witnesses, in testifying, may be allowed to exhibit a model of a locomotive engine to the jury to illustrate the use of a spark arrester, and to indicate how it could be applied to the roller-engine in question, but they should not be allowed to use such models for any further purpose.

MUNICIPAL CORPORATIONS—NEGLIGENCE—WORK DONE FOR PRIVATE CORPORATE BENEFIT.—Where a city, having been empowered to improve its streets and assess the cost of improvements to abutting owners, owns and operates a steam roller and retains compensation for rolling streets when macadamized, its liability for injuries resulting from fire started through the negligent operation of the roller is similar to that of an individual engaged in doing the same work. It cannot escape such liability by pleading that the work was done for the public benefit.

Action for damages occasioned by a fire set out from sparks escaping from the smokestack of a steam road roller, owned and being operated by the city of Dubuque in rolling newly-laid macadam on one of its streets on which the lots of plaintiff abutted. The house thereon, and its contents, were destroyed. The plaintiff had judgment at the trial and defendant appeals.

Duffy & Maguire, for the appellant.

Longueville, McCarthy & Kenline, for the respondent.

⁶⁴ LADD, J. The household goods and wearing apparel of the plaintiff and his family were destroyed. These had been used, were worn and somewhat out of style. Such property has no recognized market value, and recovery must be based on its actual value: Gere v. Council Bluffs Ins. Co., 67 Iowa, 272; Clements v. Burlington etc. Ry. Co., 74 Iowa, 442. To ascertain the actual value, it was proper to take into consideration the original cost of the articles, the extent of their use, whether worn or out of date, their condition at the time, and from all these determine what they are fairly worth. The cost alone would not be the correct criterion for the present value, but it would be difficult to estimate the value of such goods except by reference to the former price, in connection with wear, depreciation, change in style, and present condition: Luse v. Jones, 39 N. J. L. 707; International etc. Ry. Co. v. Nicholson, 61 Tex. 550; Mouat Lumber Co. v. Wilmore, 15 Colo. 136; Printz v. People, 42 Mich. 144; 36 Am. Rep. 437; State v. Hathaway, 100 Iowa, 225; Latham v. Shipley, 86 Iowa, 548. The cross-examination of Lizzie McMahon indicated that she spoke only of the actual value, and not of the market price.

2. A witness was not permitted to testify whether the house destroyed was in good repair, because merely an opinion. The value of the house was in controversy. The condition of a dwelling-house as a whole is not observable, except upon examination, and for this reason does not come within the rule of Kelleher v. Keokuk, 60 Iowa, 474, that testimony of matters within the observation of all are to be treated of as facts rather than opinion. There might well be wide differences of opinion as to what would constitute good repair, and the court rightly held that the house might be described in detail, and from such evidence the jury determine its condition.

3. Evidence was received, over the defendant's objection, showing the actual value of the house at the time ⁶⁵ of the

fire, and it is said this does not furnish the true basis of recovery. The fundamental principle in all actions for damages is that just compensation be made to him who has suffered injury from another in his person or property, and, in order to give satisfaction, measured in money, such rules are formulated as are thought best adopted to accomplish this purpose. A distinction has, for this reason, been made between growing crops, shrubs, and trees, whose chief value is because of their connection with the soil and their incidental enhancement of the value of the land, and those improvements which may be replaced at will, and whose value may readily be determined, apart from the ground on which they rest. It is thus put by Mr. Sutherland in his work on Damages, volume 3, page 368: "If the thing destroyed, although it is a part of the realty, has a value which can be accurately measured and ascertained without reference to the soil on which it stands, or out of which it grows, the recovery may be the value of the thing thus destroyed, and not for the difference in value of the land before and after such destruction." In *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 310, 50 Am. Rep. 746, crops were destroyed by overflow caused by an embankment, and the measure was held to be the difference between the market value of the land immediately before and after the injury. This rule was approved in *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 660, 7 Am. St. Rep. 501, and applied where growing trees were burned, in *Greenfield v. Chicago etc. Ry. Co.*, 83 Iowa, 276, and *Brooks v. Chicago etc. Ry. Co.*, 73 Iowa, 182: See *Smith v. Chicago etc. Ry. Co.*, 38 Iowa, 518; *Striegel v. Moore*, 55 Iowa, 88. In *Rowe v. Chicago etc. Ry. Co.*, 102 Iowa, 288, the court said: "Appellant's contention results in fixing the value of each tree destroyed or damaged by the fire, and the aggregate of such values would be the measure of plaintiff's recovery. Such a rule may well be held applicable to the destruction by fire of buildings, fences, and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage of the ⁶⁶ realty itself." It is apparent that growing crops, small trees, and orchards are of little or no use separated from the soil, and that their value must necessarily be determined in connection with the land on which they stand. This is not true of improvements which may be replaced at will. In *Graessle v. Carpenter*, 70 Iowa, 167, the defendant, by digging trenches and laying

water-pipes, injured the plaintiff's fences, walks, house, and shrubs. It was not shown the acts were of such a nature as to permanently injure the real estate, or that it could not be restored to its condition before the fire. The court, through Beck, J., announced the rule to be that which will "give the plaintiff just and full compensation In the case before us, the familiar and simple rule applicable to such cases would perfectly attain that end. That rule is this: The plaintiff may recover as damage the sum which, expended for the purpose, would put the property in as good condition as it was in before the injury, with the additional sums which would compensate the plaintiff for the use and enjoyment of the property, should he be deprived thereof of the injury, and the value of such property, as trees, buildings, and the like, which have been wholly destroyed, and cannot be restored to the condition they were in before the injury." We take it the trees and shrubs were of a character which might be replaced by others of the same actual value; otherwise the case is not in harmony with those cited. In *Freeland v. Muscatine*, 9 Iowa, 465, the defendant, in changing the grade, dug away the dirt, and caused the plaintiff's house to fall, and it was held: "The cost of rebuilding or repairing was properly taken into consideration, if we understand it as having reference to the quality and condition of the building before the accident, and the instruction cannot be taken in any other sense. It is the cost of rebuilding and repairing, which implies the restoring it to as good condition as before, and not the putting a new and firm building in the place of an old and decayed one." To prove the market value of the land immediately before and after ⁶⁷ the fire would be accomplishing, by circumlocution, what might be directly ascertained, for such difference would be the value of the house. True, location may sometimes have a bearing, as where a building is so situated as not to be useful for the purpose of its construction. In such cases this must be taken into consideration in fixing the real value. But it could be as readily done in estimating this separate from as with the land. Simplicity and directness are particularly favored in modern jurisprudence. True, such property may have no market value. It does, however, have actual value, and this is, then, the measure of recovery. The ruling was right.

4. The alleged negligence of the defendant was the failure to use any device such as a spark-arrester, to prevent the escape

of cinders, coals, and sparks from the engine. No other issue as to negligence was submitted, and the state of repair of the engine was not material. Experts, in testifying, were allowed to use a model of a locomotive engine to illustrate the use of a spark-arrester, and to indicate how it could be applied to the roller-engine, and for no other purpose. The court was careful to caution the witnesses that, "in so far as the different parts of this model are shown to be similar in this model to the steam roller, you may call attention to them, but the other parts of the model you are not to mention." We discover no error in this. This model was used to better bring to the understanding of the jury a mechanical device. It was like the use of a plat or sketch by a witness to indicate relative locations or directions.

5. The appellant asserts that in operating the steam roller it acted solely for the public, and not for any private corporate benefit. It may be observed that the defendant is incorporated under a special charter, and that by chapter 210 of the acts of the sixth general assembly it was given the power and made its duty to grade, pave, and otherwise improve its streets, and for this purpose it may levy a special tax on any lot or lots, or the owner thereof, for ⁶⁸ the purpose of grading, paving, or macadamizing the same, and is authorized to collect it under the regulations prescribed by ordinances. That such powers and duties are peculiarly municipal, and injuries occasioned by the negligence of the corporation in carrying out or performing them may be redressed in actions against the city, is not an open question in this state: *Wallace v. Muscatine City*, 4 G. Greene, 373, 61 Am. Dec. 131; *Creal v. Keokuk*, 4 G. Greene, 47; *Cotes v. Davenport*, 9 Iowa, 227; *Ross v. Clinton*, 46 Iowa, 606, 26 Am. Rep. 169.* See collection of authorities generally in note to *Goddard v. Harpswell*, 84 Me. 499, 30 Am. St. Rep. 373. Though the city might have, under its charter, contracted with others to properly roll its streets, when macadamized, at the cost of the abutting lotowners, it chose to do this work itself and retain compensation therefor. Contractors were required, in making bids, to include, for Telford macadam, "five cents per square yard, the price charged by the city of Dubuque, for the use of the roller and for rolling the street." The contract with Tibey did this, and that amount was detained from the price for such work. It was when rolling the street he had improved that the fire was set out. Had Tibey been employed to do this,

as he might have been, and through his negligence, like that of the city, fire has escaped and burned the property of citizens, would anyone question the right of recovery? Upon what theory, then will the municipality escape liability? There are two very satisfactory reasons why it must be held to answer in damages for its negligence: 1. It was engaged in doing, with its own instrumentality, that which it was authorized to contract with another to do at the expense of the abutting lot owners; and 2. The work was voluntarily assumed and carried on for compensation. Mr. Dillon thus states the rule: "The liability of the corporation for its own negligence, or that of its servants, is especially clear, and in fact indisputable, where it has received a consideration for the duties performed, or where, under permissive authority from the legislature ⁶⁹ it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit": 2 Dillon on Municipal Corporations, sec. 881. The city was authorized to make the improvement, but was not bound to undertake it with its own instrumentalities. Having done so, it incurred the same liability an individual would have done in performing like work. We have found no authorities precisely in point, but the principle is so just that none are required. It finds analogy in the cases holding municipalities, owning and operating water and gas works, docks, piers, and other property, to the same liability as individuals or private corporations with similar ownership and performing like duties. In operating the steam roller, the city was acting peculiarly for the benefit of the municipality, and in a way to enable it to exact compensation from property owners within its limits. Its liability, similar to that of an individual if engaged in doing the same work, is within the principle approved by the authorities generally.

Affirmed.

DAMAGES—MEASURE OF—DESTRUCTION OF PROPERTY HAVING NO MARKET VALUE.—If property situated at a place where it has no market value is destroyed by the negligence of another, its owner having no immediate use for it, the damages for which the wrongdoer is answerable are to be ascertained by finding the value of the hay at the nearest place where it has a market value and deducting therefrom the cost of putting it in a marketable shape and transporting it to that place: *Watt v. Nevada etc. R. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772. This rule is severely criticized in the extended monographic note which follows the case, where it is shown that market value is only one of the tests of real value, and that other tests may be applied and sometimes must be applied in order to accomplish justice.

WITNESSES—MATTERS OF OPINION.—Opinions of witnesses are sometimes admissible from necessity, and to prevent the failure of justice; but when the facts upon which the opinion is formed can be stated and described, they must be, and the jury be left to form their own opinion: *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185; *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Hurt v. St. Louis etc. Ry. Co.*, 94 Mo. 255, 4 Am. St. Rep. 374.

WITNESSES—EXPERTS.—When the testimony of experts is admissible: *First etc. Church v. Holyoke etc. Ins. Co.*, 158 Mass. 475, 35 Am. St. Rep. 508; *O'Neill v. Dry Dock etc. R. R. Co.*, 129 N. Y. 125, 26 Am. St. Rep. 512.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE.—Municipal corporations, acting within the purview of their authority, and in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, are impliedly liable for damage caused by the negligence of their officers and agents, though they may be engaged in some work that will inure to the general benefit of the municipality. Grading streets, cleansing sewers, or keeping wharves in safe condition, from which a profit is derived, are duties of this character: *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810; *Hitchins v. Mayor etc.*, 68 Md. 100, 6 Am. St. Rep. 422; *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853; *Helgel v. Wichita County*, 84 Tex. 392, 31 Am. St. Rep. 63.

IN RE ASSIGNMENT MUTUAL GUARANTY FIRE INSURANCE COMPANY.

[107 IOWA, 143.]

INSURANCE COMPANIES—MUTUAL—WHEN DO NOT BECOME STOCK COMPANIES.—A mutual insurance company organized under a statute authorizing an association of persons making mutual pledges and giving valid obligations to each other for their own insurance on the assessment plan, does not become a stock company by the issuance of shares to the subscribers of a guaranty fund, which shares are secured by obligations of the holders, and are subject to assessment from time to time to meet any deficiency that might arise in the advancements, assessments, and pledges made to pay losses and expenses. Therefore it cannot do business on the stock plan, cannot write a policy for a fixed amount, accept premiums as such, nor declare dividends.

INSURANCE COMPANIES—MUTUAL—WHO ARE NOT MEMBERS.—One who insures his property in a mutual company in a stated amount, for a specific premium, does not become a member of the company so as to be liable for future assessments.

INSURANCE COMPANIES—POWERS—ASSURED MUST TAKE NOTICE OF.—One who takes out a policy in a mutual insurance company which the latter has no power under its charter to make must take notice of the laws of the state and the articles of incorporation adopted thereunder, and cannot recover upon the policy unless enabled to do so upon the ground of estoppel.

INSURANCE COMPANIES—ULTRA VIRES—POLICY FORBIDDEN BY STATUTE.—Where a mutual insurance company issues a policy which it is prohibited by law to issue, the policy is illegal and void, and the fact that premiums have been paid thereon,

and used by the company, will not estop it from pleading ultra vires as a defense to a suit upon the policy.

INSURANCE COMPANIES—MUTUAL—LIABILITY OF MEMBERS TO A PERSON ILLEGALLY INSURED.—While the officers or directors of a mutual insurance company may be held individually liable for a wrong done to a person to whom they have issued an illegal and void policy, no liability for such wrong can be enforced against the members of the company as partners.

Chase & Seaman and Eldred S. James, for the appellant.

A. P. Barker and F. W. & L. A. Ellis, for the appellees.

144 DEEMER, J. The Mutual Guaranty Fire Insurance Company was organized in the year 1888. On the ninth day of August of that year, it filed its articles of incorporation, which stated, in substance, that certain persons, naming them, and all others who might associate with them and become members thereof, organized under the name hereinbefore stated, "to make insurance upon property against loss or damage by fire, upon the plan of mutual insurance." A guaranty fund of fifty thousand dollars, consisting of shares of one hundred dollars each, was also provided for, which was subject to increase, and which was to be secured by the obligations of the shareholders in such form as the board of directors should approve, and be subject to assessment from time to time to meet any deficiency that might arise in the advancements, assessments, and pledges made to pay losses and expenses. These assessments were to be treated as advancements to be repaid from the funds of the association. The articles further provided that the fund to pay losses and expenses should consist exclusively of moneys raised by advancements and assessments given by the members for their insurance, such assessments to be made by the board of directors or executive committee, and apportioned pro rata among the members insured. They also provided that all persons insured should be members **145** of the company during the life of their policies, and that charges for insurance should be regulated by the directors. Further provision was made for the adoption of by-laws, such as the directors might deem expedient for the conduct of the affairs of the company. The notice of incorporation stated that it was a corporation for pecuniary profit, organized under the laws of the state, to insure the property of its members by mutual pledges or obligations against loss or damage by fire, et cetera. The by-laws provided for the issuance of one and five-year policies, premiums for the one-year policies to be in cash, and for the

five-year policies a note for five times the annual premium, to be paid in installments of not more than one-fifth of the amount in any one year, at such time or times as the board of directors or executive committee might order. But one full annual premium was required to be paid in cash upon the delivery of all policies. Assessments were to be equitably levied upon the notes to pay losses and expenses, and notice of these assessments was required. Another article of the by-laws provided for the cancellation of policies, and return of such part of the cash premiums as were unearned, based upon the usual short rates. Subscribers to the guaranty fund were to be allowed five per cent of the amount of their shares as compensation for the responsibility assumed by them, which amount was to be charged to the expense account of the company. The policy in suit was issued by this corporation, insuring the Ness County Sugar Company, of Ness county, Kansas, against loss or damage by fire upon its plant in said Ness county, loss, if any, to be paid to A. E. Alvord, mortgagee. The policy was for one year, and the sugar company paid the premium (twenty-five dollars) in cash. It was called a "nonparticipating policy," and provided for cancellation at customary short rates. This condition also appears therein: "In consideration of the issuance of this policy for the amount of premium before stated, the holder of this policy hereby releases any and all claims for dividends, earnings, or profits of this company." The only ¹⁴⁶ thing on the face of the policy to indicate that it was issued by a mutual company or upon the mutual plan is the name "Mutual Guaranty Fire Insurance Company." On the twenty-third day of August, 1890, and during the life of the policy, the property insured was totally destroyed by fire. Proper notice and proofs of loss were given the company, but the loss was not paid; and on the second day of January, 1891, the company made a general assignment for the benefit of its creditors. A. P. Barker was made assignee and he makes the objections which are interposed to appellant's claim.

The record presents two questions for our determination: 1. Was the policy issued without authority by the officers of the company? 2. Is the policy invalid because made in contravention of the statutes of the state? Some other questions are argued which will be considered during the course of the opinion, but these are the controlling ones in the case.

At the time the company was organized, the law authorized

two kinds of mutual insurance companies—one to do business on the plan of mutual insurance, under sections 1122 and 1159, inclusive, of the code of 1873; and the other an association of persons making mutual pledges and giving valid obligations to each other for their own insurance on the assessment plan, under section 1160. The company which issued the policy in suit had no stock, except the shares issued to the subscribers of the guaranty fund. The issuance of these shares and the creation of this fund did not make it a stock company, however: *Corey v. Sherman*, 96 Iowa, 114. The idea of the incorporators, no doubt, was to organize under section 1160 of the code; and we shall treat the company as organized under that section, our authority for so doing being the *Corey-Sherman* case, to which we have just referred, and which is in many respects much like the case at bar. Under such articles of incorporation, the persons becoming members ¹⁴⁷ of the company may make mutual pledges, and give valid obligations to each other for their own insurance, but cannot insure property not owned by one of their number, nor can they receive premiums or make dividends: Code 1873, sec. 1160. Another provision of the law is to this effect: "No company organized upon the mutual plan shall do business or take risks upon the stock plan. Neither shall a company organized as a stock company do business upon the plan of a mutual insurance company." Referring back to the articles of incorporation which we have heretofore quoted, and we find that the company was to do business upon the mutual plan, and that the funds for the payment of the losses and expenses were to consist of moneys raised by advancements and assessments on mutual pledges given by the members of the company. Now, it may be that the company was authorized to accept an advance payment of money as a pledge against which assessments might be levied from time to time; but it is clear that it was not permitted to accept premiums as such, nor could it declare dividends. It had no power to write a policy for a stated and definite amount of insurance. Neither could it do business on the stock plan. That it undertook to insure the sugar company for a definite and specific amount, in consideration of a fixed and stated premium, is too plain for successful contradiction. The assured was not a member of the company, except in name, and there was no mutuality between him and the other policy holders. It has been held, and with good reason, that one who insures his property in a mutual company

in a stated amount, for a specific premium, does not become a member of the company, so as to be liable for future assessments: *Farmers' etc. Ins. Co. v. Smith*, 63 Ill. 187; *Illinois etc. Ins. Co. v. Stanton*, 57 Ill. 354; *Given v. Rettew*, 162 Pa. St. 638. Certainly there was no liability on the part of the sugar company or the appellant to pay assessments for losses. The cash premium demanded by the company was paid, and the company agreed to pay a definite and certain amount in ¹⁴⁸ case of loss. There was no mutuality between the members of the company who were insured on the assessment plan and those who paid cash premiums in full. The contract was one which the company had no power to make; and, as the assured must take notice of the laws of the state and the articles of incorporation adopted thereunder, it follows that appellant cannot recover, unless it be on the theory of estoppel.

The doctrine of ultra vires, as applied to corporations, is one of the most difficult with which courts have to deal, and the rules are not as definitely settled as we might wish. Were it not for the statutes prohibiting mutual companies organized under section 1160 from taking premiums and from doing business on the stock plan, we would be inclined to hold that as the corporation had accepted and used the premium paid for the policy in suit, it should be estopped from pleading ultra vires as a defense. Indeed, the modern authorities seem to sustain that rule: *Thompson v. Lambert*, 44 Iowa, 239. See *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134; *Matt v. Roman Catholic etc. Soc.*, 70 Iowa, 455; *Beach on Private Corporations*, sec. 423, and cases cited. But where, as in this case, the act is prohibited by statute, the contract is illegal and void, and cannot be enforced. The rule as stated by Taylor in his work on *Corporations*, sec. 299, is as follows: "If a statute expressly forbids a corporation to make a certain contract, the contract is void even though not expressly declared to be so, and is incapable of ratification; and that the contract is void, as unlawful, may be pleaded by anyone to an action founded directly and exclusively on such contract; unless: 1. The statutes expressly state what the consequences of violating it shall be, and those consequences are other than that the contract shall be void: or 2. Unless the statutory prohibition was evidently imposed for the protection of a certain class of persons, who may alone take advantage of it; or 3. Unless to adjudge the contract void and incapable of forming the basis of a right

of action ¹⁴⁹ would clearly frustrate the evident purposes of the prohibition itself." Sustaining his conclusions are the following, among other cases: New York etc. Trust Co. v. Helmer, 77 N. Y. 64; Utica Ins. Co. v. Scott, 19 Johns. 1; Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211; Beecher v. Marquette etc. Mill Co., 45 Mich. 103; McPherson v. Foster, 43 Iowa, 48, 22 Am. Rep. 215. Such a contract will not be enforced, although it may have been executed by one of the parties. Nor can the doctrine of estoppel be invoked to bind the corporation to a forbidden act: Kent v. Quicksilver Min. Co., 78 N. Y. 159; Miller v. Insurance Co., 92 Tenn. 167. Section 1160 of the code of 1873 provides that companies organized thereunder shall not accept premiums. This the appellant knew, or ought to have known, as he was charged with knowledge of the law. His position is not such as appeals very strongly to a court of equity. He paid his money knowing that the company had no right to accept it, and ought not to be allowed to base an estoppel thereon. Again, the company was expressly prohibited from issuing such a policy as the one in suit.

Appellant further contends that, if the corporation was not permitted to do the business in which it was engaged, no corporation existed, and that the incorporators became liable as a partnership for the business done under the articles. The difficulty with this contention is that the corporation was not organized to do an illegal or unlawful business: See Corey v. Sherman, 96 Iowa, 114. Its articles clearly provide that it is to do business under section 1160 of the Code, and, if it did not do so, the promoters thereof are not liable as partners. They took the necessary steps to incorporate, and, if the officers or directors thereafter proceeded to do an illegal business, they may be individually liable for the wrong done, but the other members of the corporation will not be held liable as partners. These propositions are elementary, and require no citation of authorities in their support. See, as sustaining our conclusions on the whole case, Rockhold v. Canton etc. Soc., 129 Ill. 440; ¹⁵⁰ Pittsburgh etc. Ry. Co. v. Keokuk etc. Bridge Co., 131 U. S. 371; Miller v. Insurance Co., 92 Tenn. 167; O'Neil v. Pleasant Prairie etc. Ins. Co., 71 Wis. 621; Eddy v. Merchants' etc. Ins. Co., 72 Mich. 651; Lucas v. White Line Transfer Co., 70 Iowa, 541, 59 Am. Rep. 449.

The case differs essentially from Beach v. Wakefield, 107 Iowa, 567. In that case the corporation had power to make contracts

like the one upon which it was sued. The prohibition was against an indebtedness exceeding two-thirds of its capital stock. In this case the insurance company had no power to make a contract of insurance on the stock plan and it was absolutely inhibited from receiving premiums. Again, in that case the corporation had the benefit of the money borrowed, and was asked to repay it. To a plea of ultra vires we quoted the following rule from Morawetz on Corporations: "If an agreement is legally void and nonenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what he has received. Under these circumstances the court will grant relief, irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant relief": See, also, *Heuer v. Carmichael*, 82 Iowa, 290; *Peatman v. Centerville etc. Power Co.*, 100 Iowa, 245. If this were an action to recover back the premium paid or for benefits received, the rule just quoted might apply: *Pittsburgh etc. Ry. Co. v. Keokuk etc. Bridge Co.*, 131 U. S. 371. But such is not the nature of the proceeding. It is to recover upon a contract of indemnity which the corporation had no power to make, and which is prohibited by statute. The case does not differ in principle from *Lucas v. White Line Transfer Co.*, 70 Iowa, 541, 59 Am. Rep. 449, which was an action upon a contract of suretyship. ¹⁵¹ We there held that the corporation was not liable and that the officers of the corporation could not ratify such a contract. In the *Beach-Wakefield* case we held that the corporation was bound to account for the money it had received on the theory of an equitable estoppel, or that he who has accepted the benefits of a transaction must accept its burdens. The law expressly enjoined the officers of the insurance company from receiving premiums, and it prohibited the making of just such contracts as the one in suit. Surely, the members of the society who were bound to each other by mutual pledges should not be held to respond to appellee for the amount of his loss. The order disallowing appellant's claim was clearly right, and it is affirmed.

INSURANCE COMPANIES—MUTUAL INSURANCE COMPANIES differ essentially from stock insurance companies: *Baxter v. Chelsea Mut. etc. Co.*, 1 Allen. 294, 79 Am. Dec. 730.

INSURANCE COMPANIES—MUTUAL—MEMBERS NOT PARTNERS.—The holder of a policy of insurance in a mutual company is

in no sense a partner of the corporation; his relation with the company is one of contract, measured by the terms of the policy: *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 4 Am. St. Rep. 482; see, also, *Payne v. Snow*, 12 Cush. 443, 59 Am. Dec. 203.

The Doctrine of Ultra Vires in Relation to the Contracts of Private Corporations.*

The rapid spread of the corporation idea in the business world, particularly in the United States, during the last half-century, has necessitated a correspondingly rapid development of corporation law. This latter development has been to a large degree forced and unnatural. The questions arising have been both new and numerous, following upon each other in a rapid complexity, more or less disconcerting to the judicial temperament, accustomed from time immemorial to leisurely and dignified mental operations. In such a state of affairs, our judicial system has apparent disadvantages. Corporation law has been developed by our numerous state and federal courts under varying conditions, varying statutes, and varying constitutional provisions, and it is to be expected that corporation law, as a separate body of our law, should present the aspect of an unfinished structure being hastened to completion in a manner at once unsystematic and spasmodic. Much of it still remains for building, and much that has been placed in the structure will have to be torn away before a logical and congruous completion will be had.

Involved State of Our Subject.—Those students of corporation law who have considered the doctrine of ultra vires bear unanimous witness that the subject is much confused and unsettled. Mr. Brice, having prepared his work on *Ultra Vires*, speaks of the doctrine in his preface as “a guiding, or rather misleading, principle in the legal system” of England, and says that “the decisions and dicta upon this subject are very conflicting, and some absolutely irreconcilable, while the principle is become, if not an excrescence upon, at least a very disturbing element in, the legal system.” Mr. Brice speaks concerning the state of the doctrine in England. That the same conditions obtain in our own country cannot be doubted by one who has attempted to collect and classify the American cases. Perhaps the best qualified of American writers to speak upon this matter is Seymour D. Thompson, who, in an article on “The Doctrine of Ultra Vires in Relation to Private Corporations,” published in the *American Law Review*, volume 28, page 376, says: “After having given a long and attentive study to the subject, the writer affirms that the Anglo-American law with reference to it is in a state of hopeless and inextricable confusion; that contradictory decisions are constantly rendered by the same courts, that opposing principles, tending to contrary results, jostle and crowd each other as the ice floes jostle and crowd each other going southward out of Baffin’s bay through Davis straits; and that the judge seizes upon

*REFERENCE TO MONOGRAPHIC NOTES.

Sale by corporation of its assets: 99 Am. Dec. 333-338.

Power of corporation to purchase its own capital stock: 33 Am. St. Rep. 339-347.

Right of one corporation to acquire stock in another: 36 Am. St. Rep. 134-142.

Right to transfer public franchises: 35 Am. St. Rep. 390-407.

one of these principles to-day and to-morrow upon another, and enlarges it or applies it according to the seeming exigencies of justice in the particular case."

Misuse of Terms.—Although partly traceable to other causes, this confusion is due in a great measure to the carelessness with which courts have used the term "ultra vires." "There is nothing of mystery or of sanctity in the use of the words of a dead language—'ultra vires,'" said the court in *National Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235. The term, if it have any proper place in the vocabulary of the law, must have a definite and ascertainable meaning. Whether with strict propriety or not, the term, "ultra vires," is used in different senses. "An act is said to be ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be ultra vires with reference to the rights of certain parties when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the general powers of the corporation, with the consent of the parties interested, or for some other purpose": *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300. It is a rather common error to confuse the terms "illegality" and "ultra vires," terms which represent totally different and distinct ideas. A contract of a corporation may be both ultra vires and illegal, though it by no means follows that because such a contract is ultra vires it is also illegal, nor is illegality a necessary, or perhaps even a usual, characteristic of ultra vires contracts. Whether a contract is illegal or not is determined by its quality, and in this connection it matters little whether it be the contract of a corporation or of an individual; whether it be ultra vires or not is determined from a consideration of the powers expressly conferred upon the corporation by the instrument of its creation, together with those other powers implied in the purposes of its creation and in the powers expressly granted: *Bissell v. Railroad Cos.*, 22 N. Y. 258. An illegal contract, the same being illegal in the sense of *malum in se* or *malum prohibitum*, is ultra vires of anyone to make, corporation or private individual; so when the contract in question is of a corporation it would avoid confusion if the terms "illegal" and "ultra vires" were divorced, and only the latter used, especially where the question is not of its legality but purely whether or not it is ultra vires of the corporation making it: Compare *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319; *Franklin Company v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9. To say that a contract is ultra vires is to affirm that it is illegal in the sense that it is beyond the powers conferred by law upon the corporation making the contract, but it is to this especial sense that the term is properly applicable. Or, we may say, the term "illegal" is generic while that of ultra vires is specific, and to use a generic term where a specific term only is applicable is to sacrifice exactness and produce confusion. Of what value are refinements in legal terms and definitions if we do not recognize them?

Proper Use of "Ultra Vires" and the Meaning of the Term.—When acts of corporations are spoken of as ultra vires, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created: Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Kadish v. Garden City etc. Assn., 151 Ill. 531, 42 Am. St. Rep. 256. The term "ultra vires" is applicable to contracts of corporations only when they involve adventures or undertakings outside and not within the scope of the power given by their charters: Leslie v. Lorillard, 110 N. Y. 519; Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Citizens' State Bank v. Hawkins, 71 Fed. Rep. 369; Matthews v. Skinner, 62 Mo. 329, 21 Am. Rep. 425. Mr. Justice Gray, in Railway Cos. v. Keokuk Bridge Co., 131 U. S. 371, thus states the basis of the doctrine of ultra vires: "The reasons why a corporation is not liable upon a contract ultra vires, that is to say, beyond the powers conferred upon it by the legislature and varying from the objects of its creation as declared in the law of its organization are: 1. The interest of the public, that the corporation shall not transcend the powers granted; 2. The interest of the stockholders, that capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; 3. The obligation of everyone entering into a contract with a corporation to take notice of the legal limit of its powers."

As we shall have occasion to note later, courts have adopted different views as to the status of ultra vires contracts and the enforceable rights which may arise out of them. The doctrine of ultra vires as it first took shape was quite rigid. It proceeded upon the old theory as to the character of corporations which were regarded as purely artificial persons having absolutely no powers beyond those given under a strict construction of their charters. Beyond the limits of these powers they could create no valid obligations. A contract beyond these powers was absolutely null and void: Straus v. Eagle Ins. Co., 5 Ohio St., 60. A corporation had no potential existence outside the scope of its creation: Davis v. Old Colony R. R., 131 Mass. 258, 41 Am. Rep. 221. So, where a corporation attempted to make a contract entirely foreign to the purpose and objects of its creation, such contract was void: Rock River Bank v. Sherwood, 10 Wis. 230, 78 Am. Dec. 669. "A contract of a corporation which is ultra vires, in the proper sense, that is to say outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only," said Mr. Justice Gray in Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, "but wholly void, and of no legal effect. The objection to the contract is, not merely

that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it": *Thomas v. Railroad Co.*, 101 U. S. 71; *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798. A corporation having taken and used steamboats purchased under an ultra vires contract was held to have incurred no liability upon notes given for the purchase price: *Pearce v. Madison etc. R. R. Co.*, 21 How. 441. These matters open up large questions which we will treat later herein. Here it is only our purpose to give an outline of the theories out of which the doctrine under consideration grew. It should be remembered that the purely private corporation is a modern creation. Early corporations were mostly created for public purposes and invested with public franchises. Therefore the interest of the public that they should be allowed no other powers than those granted them was more than imaginary. The same is to be said of quasi public corporations. The purely private corporation, however, still has a doubtful status, and it is obvious that in applying to it the doctrine of ultra vires new problems have been encountered which have rendered such application difficult. In many ways the old conception of a corporation has been qualified, as, for example, in holding corporations liable for torts, though the commission of torts is certainly outside and beyond the purposes and objects for which corporations are created. The tendency has been, and is, to treat private corporations as private individuals, a tendency which cannot be too highly commended. It is coming to be sensibly recognized that a private corporation is really an association of persons and that no judicial dictum or legislative enactment can alter this fact: *Stockton v. Central R. R. Co.*, 50 N. J. Eq., 52.

Judicial Prejudice Against Plea of Ultra Vires.—The modern tendency is to relax the ancient rigor of the doctrine of ultra vires as applied to the contracts of private corporations. The doctrine is held to have no application in favor of corporations for wrongs committed by them: *National Bank v. Graham*, 100 U. S. 699. "The law," it is said, "never sustains the defense of ultra vires out of regard for the corporation. It does so only where the most persuasive considerations of public policy are involved": *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412. A liberal application of the doctrine is generally approved, and it is held that the plea of ultra vires should not, as a general rule, prevail, whether it is interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong: *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412; *Third Avenue Sav. Bank v. Dimock*, 24 N. J. Eq., 26; *Holmes etc. Co. v. Holmes etc. Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448; *Linkauf v. Lombard*, 137 N. Y. 417, 33 Am. St. Rep. 743; *Carson City Sav. Bk. v. Elevator Co.*, 90 Mich. 550, 30 Am. St. Rep. 454; *Bear River Valley etc. Co. v. Hanley*, 15 Utah.

506; *Lewis v. American Sav. etc. Co.*, 98 Wis. 203; *Railway Co. v. McCarthy*, 96 U. S. 258. The defense of *ultra vires* is looked upon by the courts with disfavor whenever it is presented for the purpose of avoiding an obligation which the corporation has assumed merely in excess of powers conferred upon it and not in violation of some express provision of the statute: *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69. "The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds," said Lord St. Leonards in *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331. A court will be very slow to set aside a contract as *ultra vires* because not beneficial to the corporation, where the general power to make it is conceded, and when the stockholders, at the time it was made, with the lights they then had, considered it to be beneficial: *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335. The old doctrine of *ultra vires*, resting in the close interest that the public has in restraining corporations from contracting beyond their powers, is left far behind in the holding that a corporation, to make the defense of *ultra vires* available in an action on contract, must plead it and make manifest the defect in power relied upon: *Charleston etc. Turnpike Co. v. Willey*, 16 Ind. 34. It is presumed that a contract made by a corporation is *ultra vires* and one assumes the burden of proof who sets up that it is *ultra vires*: *Downing v. Mount Washington Road Co.*, 40 N. H. 230; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378.

What Contracts are Ultra Vires.—It is to be deplored that the term "*ultra vires*" has been applied in various senses to the contracts of private corporations. The proper sense, and the one to which we shall try to adhere herein, is found in its application to contracts which are outside the objects for which the corporation was created, and in excess of the powers conferred upon it by the legislature in the instrument of its creation. As we have said already, the term is improperly applied to contracts which are forbidden by public policy, or by positive law, such contracts being illegal. Again, it is applied to contracts which are defective, not in the fact that their execution is outside the purpose and power of the corporation, but in the fact that they are executed in an unauthorized manner; and, again, to contracts the defect in which is that they were entered into by officers of the corporation in excess of the scope of their authority, although the power of the corporation to properly enter into such contracts is undoubted. The latter class of cases pertain to agency and none of the applications made of the term, *ultra vires*, is strictly correct except that one first mentioned and approved herein. An indefinite amount of space might be taken up in calling attention to the infinite variety of contracts made by private corporations and construed by courts to be or not to be *ultra vires*. The businesses for the transaction of which corporations are formed and chartered are as various as those engaged in by private individuals, and these corporations transact their businesses along much the same lines as do individuals. There is a continued

stress toward the allowance to corporations of the same right to contract that is allowed individuals, but the special difference between the two is a restraining factor. A corporation's powers are limited by the charter of its creation, an impediment with which individuals are not burdened, and in any case involving the ultra vires quality of a corporation's contract, the contract and the charter in question are the important matters. However, a certain degree of classification is possible and may serve to illustrate the reason of the doctrine, as well as the unreason with which it is sometimes interpreted and applied.

The statement of the sense in which we shall use the term "ultra vires" is the groundwork of any attempt to answer the query, What contracts of private corporations are ultra vires? A detailed notice of the cases will simply elaborate this statement. It may be regarded as well settled that where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes power as a natural person enjoys it, with all its incidents and accessories; it may borrow money to attain its legitimate objects precisely as an individual, and bind itself by any form of obligation not forbidden: *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412; *Memphis etc. R. R. Co. v. Dow*, 19 Fed. Rep. 388; *New England Fire etc. Ins. Co. v. Robinson*, 25 Ind. 536; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Hays v. Gallon Gas Light etc. Co.*, 29 Ohio St., 330; *Booth v. Robinson*, 55 Md. 419. It is a question of what is directly or impliedly inhibited by the charter of a corporation. Unless such an inhibition exists, a corporation may loan its undivided profits: *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370. A statute providing that, "No corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock-jobbing, exchange, or banking business of any kind," refers only to the buying and selling of merchandise as an employment, implies operations conducted with a view of realizing the profits which come from skillful purchase, barter, speculation, and sale, and does not render ultra vires a single purchase of cotton by a railroad corporation incorporated thereunder: *Graham v. Hendricks*, 22 La. Ann. 523. Whether an act of a corporation comes within the powers granted by its charter must be determined in each case from all its facts and circumstances. Acts which, if standing alone, or when engaged in as a business, would be beyond the powers of the corporation, are not necessarily ultra vires when they are merely incidental to, or form part of, an entire transaction, that, in its general scope, is within the corporate purpose: *Central Ohio Nat. Gas etc. Co. v. Capital City Dairy Co.*, 60 Ohio St. 96.

If a contract is intended to further the interests and objects of a corporation, courts are loth to declare it ultra vires; and it is obvious that such a criterion allows courts a very liberal latitude. A contract by a railroad corporation employing a surgeon to attend injured employes is not ultra vires: *Bedford Belt Ry. Co. v. McDonald*, 17 Ind. App. 492; 60 Am. St. Rep. 172. Two railroad companies may enter into a contract to advance one another's in-

terests in all lawful manners: *Tonawanda R. R. Co. v. New York etc. R. R. Co.*, 42 Hun, 496. It is said in *Jacksonville etc. Ry. etc. Co. v. Hooper*, 160 U. S. 514: "Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company within its chartered powers, and to contribute to the comfort of those who travel thereon. To lease and maintain a summer hotel at the seaside terminus of a railroad might obviously increase the business of the company and the comfort of its passengers, and be within the provisions of the statute of Florida above cited, whereby a railroad company is authorized 'to sell, lease, or buy any land or real estate not necessary for its use,' and to 'erect and maintain all convenient buildings . . . for the accommodation and use of their passengers.'" A contract entered into by a railroad corporation before, for the transportation of freight after, the completion of its line, is not ultra vires: *Louisville etc. Ry. Co. v. Flanagan*, 113 Ind. 488; 3 Am. St. Rep. 674. But a corporation chartered to carry on the business of a common carrier is not authorized to contract for the purchase and sale of grain: *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781; though in that case it was doubted but that such corporation might lawfully purchase grain and other produce for storage and shipment, for the purpose of keeping its warehouses and boats employed.

Where a corporation was chartered "to buy, own, and sell real and personal property and to improve the same," it was held not ultra vires for it to contract for the erection of a building on its lands and to turn the same over to a college corporation to be organized. This upon the ground that the corporation had power to build the college, or do anything else, the direct or proximate tendency of which would be to improve the property of the corporation by enhancing its value, or to render it more desirable and salable: *Fulton v. Sterling Land etc. Co.*, 47 Kan. 621. Compare *Kentucky Lumber Co. v. Green*, 87 Ky. 257. Similarly, a corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide and to sell, and to make any contract essential to the transaction of its business, are expressly granted, possesses, as fairly incidental, the power to incur liability in respect of securing better facilities for transit to and from the lots of land, as by building a bridge: *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294. A contract by a mining corporation to advance a sum of money for the construction of a tunnel to be used in conducting its business is not ultra vires: *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121. It is not ultra vires for a corporation organized for the manufacture of certain articles to assume to fill a contract made with another for furnishing such articles: *Louis Cook Mfg. Co. v. Randall*, 62 Iowa, 244. But a savings bank empowered by its charter to "borrow money, buy and sell exchange, bullion, bank notes, government stocks, and other securities, has not the power to enter into speculative contracts for the sale or purchase of stocks at the stock board or elsewhere

subject to the hazard and contingency of gain or loss. Such contracts are ultra vires: *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482. The character of the transactions in such a case is all-important. Thus, the fact that a cotton-mill corporation purchases cotton for future delivery, through a broker, and puts up margins necessary to carry it, does not render the purchases ultra vires, if they were not in fact speculations on the rise and fall of cotton, but were made in the ordinary and legitimate business of the mill for its own use: *Sampson v. Camperdown Cotton Mills*, 82 Fed. Rep. 833. Contracts in furtherance of the business of a corporation are not ultra vires because made in anticipation of legislation that will authorize the completion of the contract: *New Haven etc. Co. v. Hayden*, 107 Mass. 525; *Supervisors v. Wisconsin Cent. R. R. Co.*, 121 Mass. 460. But a corporation does not possess the power to acquire by assignment claims of others for damages growing out of an alleged conspiracy to defraud, but in no way connected with its affairs, and not necessary to preserve its property or protect its interests: *Farwell Co. v. Wolf*, 96 Wis. 10; 65 Am. St. Rep. 22. See as illustrative cases: *Simmons v. Troy Iron Works*, 92 Ala. 427; *Richelieu Hotel Co. v. Military etc. Co.*, 140 Ill. 248; 33 Am. St. Rep. 234.

Contracts Transferring or Leasing Corporate Property.—In an earlier note in this series we discussed the right of corporations to transfer public franchises, and stated that the cases are virtually in unison as to the doctrine that a transfer of franchises cannot be effected without the authority of the sovereign grantor, and that the rule is the same whether the transfer is attempted to be made by a voluntary act, such as conveyance, mortgage, lease, consolidation, or by a forced sale at the instance of the creditors of the holder of the franchises: See monographic note to *Brunswick Gas Light Co. v. United Gas etc. Co.*, 35 Am. St. Rep. 390; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *Smith v. Cornelius*, 41 W. Va. 60; *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52. This rule, which is with good reason applied to public and quasi public corporations, loses its reason when attempted to be applied to strictly private corporations in regard to their corporate assets. No reason is apparent why such a corporation may not in good faith and while solvent dispose of its assets in whole or in part: See monographic note to *Miner's Ditch Co. v. Zellerbach*, 99 Am. Dec. 333. Such corporations, like a partnership or individual, may either sell or lease their property: *Holmes etc. Mfg. Co. v. Holmes etc. Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490; *Evan v. Boston Heating Co.*, 157 Mass. 37; *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685; *Ardesco Oil Co. v. North American Oil etc. Co.*, 66 Pa. St. 375; *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166; *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57. Compare *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336; *McCutcheon v. Merz Capsule Co.*, 71 Fed. Rep. 787.

Negotiable Paper—Contracts of Guaranty and Suretyship.—It seems

that it is not ultra vires for a corporation to enter into contracts of guaranty and suretyship when it does so in the legitimate furtherance of its purposes and business. Thus, a lumber company, where it is essential to the successful prosecution of its business that a short line of railway penetrating its timber lands should be constructed and operated, may guarantee the bonds of a railroad company taking such matter in hand: *Mercantile Trust Co. v. Kiser*, 91 Ga. 636; *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335. So a lumber company may become surety upon the bond of a contractor to whom it furnishes building material, such being the custom of manufacturers of lumber in the same locality: *Wheeler v. Everett Land Co.*, 14 Wash. 630. And it was held not to be ultra vires for a brewing corporation to guarantee the rent of a hotel, the bar fixtures and furniture of which it owned and in which its beer was to be sold: *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239; though the contrary has also been held: *Filon v. Miller Brewing Co.*, 60 Hun, 582. However, if two business corporations have different charter purposes, and have, therefore, no lawful right to aid or assist each other in business, one cannot, in the absence of statutory authority, become surety for the other: *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778. See, also, *Lucas v. White Line Transfer Co.*, 70 Iowa, 541, 59 Am. Rep. 449. The power of corporations to enter into contracts of guaranty and suretyship is closely related to their power to execute negotiable and accommodation paper. A corporation with power to execute negotiable paper may bind itself as indorser or guarantor of bonds received by it in due course of business, for the purpose of increasing the value of such bonds: *Tod v. Kentucky Land Co.*, 57 Fed. Rep. 47. The proposition is well supported by authority that it is ultra vires of a corporation to execute accommodation paper or to enter into contracts of guaranty or suretyship not in furtherance of its business, unless given express authority to do so: *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; *Lyon v. First Nat. Bank*, 85 Fed. Rep. 120; *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. Rep. 742; *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75; *National Park Bank v. German-American etc. Warehousing etc. Co.*, 116 N. Y. 281; *Bridgeport City Bank v. Empire Stone etc. Co.*, 30 Barb. 421; *Madison etc. Road Co. v. Watertown etc. Road Co.*, 7 Wis. 59. But it has been held that the stockholders may ratify and validate accommodation paper executed without authority by the officers of a corporation, no other rights intervening: *Martin v. Niagara Falls Paper etc. Co.*, 122 N. Y. 165.

On the Purchase by a Corporation of its Own or Stock of Another Corporation.—In America, the great weight of authority sustains a doctrine directly opposed to that announced by the English courts, and in this country it is very generally maintained that, in the absence of statutory prohibition, a solvent corporation or its officers may invest its funds in the purchase of its own stock; or may take such stock in payment of debts due it from a stockholder; or may take it in exchange for other property owned by the corporation: See

monographic note to *Commercial Nat. Bank v. Burch*, 33 Am. St. Rep. 339, thoroughly discussing this subject. Compare *Adams & Westlake Co. v. Deyette*, 5 S. D. 418, 49 Am. St. Rep. 887, and *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370. As to the purchase by one corporation of stock in another a contrary rule obtains. Such transactions are viewed by the courts with particular disfavor because of their tendency to create and encourage monopolies. In this matter we are confronted with great difficulties, because the acquisition of the stock may be so connected with the business of the corporation that much doubt may reasonably exist as to whether or not the transaction is defensible, on the ground that it was incidental to the exercise of some power clearly possessed by the corporation. It is well settled, however, that the power of one corporation to purchase the stock of another corporation must be authorized by its charter or by general law, and that while this power may sometimes be incidental to some undisputed authority, its exercise when the object is to obtain the control and management of another corporation is distinctly *ultra vires*: See monographic note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 134; *Commercial Fire Ins. Co. v. Board of Revenue*, 99 Ala. 1, 42 Am. St. Rep. 17; *Railway Co. v. Iron Co.*, 46 Ohio St. 44; *Marble Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71; *Knowles v. Sandercock*, 107 Cal. 629; *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335.

Executory Contracts under the Doctrine of Ultra Vires.—We have, perhaps, taken up too much space in discussing what contracts of private corporations are *ultra vires*. Any treatment of that question within the limits of a note of this kind must be quite inadequate, but a rapid *resumé* such as we have attempted seemed necessary as a preparation to taking up the phase of the subject upon which we now enter. In discussing the application of the doctrine of *ultra vires* to the contracts of private corporations, we find that such contracts fall into two classes—executory and executed; and that executed contracts are divided into those wholly executed, and those partially executed. The doctrine of *ultra vires* may be said to be only applicable, in its fullest force, to executory contracts: *Thompson v. Lambert*, 44 Iowa, 239. When a contract has been executed wholly or in part either by the corporation or the other party, other elements enter, as we shall see, equities arise which demand recognition, and the application of the doctrine is qualified. An *ultra vires* contract which is purely executory cannot be enforced by either party, and in a suit thereon the plea of *ultra vires* is a good defense either for the corporation or against it: *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695; *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Pennsylvania etc. Navigation Co. v. Dandridge*, 8 Gill. & J. 248, 29 Am. Dec. 543; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713; *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 70 Miss. 669, 35 Am. St. Rep. 681; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Jemison*

v. Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134; *State Board v. Citizens' Street Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412; *Simpson v. Building etc. Assn.*, 38 Ohio St. 349; *Easun v. Buckeye Brewing Co.*, 51 Fed. Rep. 156. By the same cases it is affirmed that an ultra vires contract which is executory cannot be made the basis of a recovery of damages. It is a reasonable rule that one whose condition has not been changed or prejudiced by an ultra vires contract cannot compel its enforcement: *Twiss v. Guaranty Life Assn.*, 87 Iowa, 733, 43 Am. St. Rep. 418. Courts will not decree a conveyance to a corporation under an ultra vires contract, and will hesitate to set aside such conveyance when already completed: *Case v. Kelly*, 133 U. S. 21. While a contract ultra vires remains executory courts interfere to prevent its enforcement, or, on the application of a shareholder or other authorized person, the court prevents its execution: *Kadish v. Garden City etc. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Board of Commrs. v. Lafayette etc. R. R. Co.*, 50 Ind. 85; *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264; *Stewart v. Erie etc. Trans. Co.*, 17 Minn. 372; *Gifford v. New Jersey R. R. etc. Co.*, 10 N. J. Eq. 174; *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 5; *Dodge v. Woolsey*, 18 How. 331. The right of a stockholder to such relief does not depend in any respect upon the profitableness or unprofitableness of the contract in question: *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336. Though he may be precluded from obtaining relief by his laches in seeking it: *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73; *Boston etc. R. R. Co. v. New York etc. R. R. Co.*, 13 R. I. 260; or by his acquiescence in the contract: *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337; *Memphis etc. R. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69.

Executed Ultra Vires Contracts.—Where an ultra vires contract has been fully performed by both parties, it is justly held that it is no longer assailable by either party: *Cincinnati etc. R. R. Co. v. McKeen*, 64 Fed. Rep. 36; *Thomas v. Railroad Co.*, 101 U. S. 71; *Parish v. Wheeler*, 22 N. Y. 494; *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931; *Camden etc. R. R. Co. v. May's Landing etc. R. R. Co.*, 48 N. J. L. 530; *Taylor v. South & North Ala. R. R. Co.*, 4 Woods, 575; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290. It is only when we come to consider ultra vires contracts which have been fully performed on one side that we find the cases inextricably confused. There are sound and apparent considerations which give to such contracts a standing different from that either of wholly executory or wholly executed contracts. They present the spectacle of benefits received and enjoyed by one party, and outlays by the other party, with no consideration having passed between them. A right is presented for which, according to the foundation maxim of equity, there must be a correspond-

ing remedy. Few courts, if any at all, attempt to deny this, but in their search for the desired remedy they have taken different paths, some of which have led far away from the object sought to be attained. Perhaps, as we have already suggested, a great deal of the present confusion in this branch of the law would have been avoided had courts agreed, at the beginning, upon a definition of the term "ultra vires" as applied to the contracts of private corporations. The attempt of some courts to recognize no distinction between an ultra vires contract and one that is illegal because in violation of the letter of the law, or because contrary to public policy, was most unfortunate. Beginning with the proposition that an ultra vires contract is unlawful and void, courts naturally held that such a contract could not be the foundation of any rights. No performance or ratification, no application of the rules of estoppel, could give to such a contract any semblance of validity. From another point of approach courts were confronted by the rule of law that persons dealing with a corporation must take notice of its powers, and, therefore, a person having entered into a contract with a corporation which was ultra vires of the corporation, did so with notice of such fact, and was guilty of a species of contributory negligence which disabled him to acquire any rights under such contract. But the injustice of such a rule became manifest soon enough, and exceptions became numerous. Approaching from still another direction, the problem presented itself in this wise: Limitations upon the powers of corporations are made for the benefit of the public. Ultra vires contracts violate the obligations of corporations to the sovereign which delegates them their powers. Hence, grew the doctrine that the question as to whether an act or contract of a corporation is ultra vires can only be raised by, or at the instance of, the state. These matters, coupled with a mistaken idea of the character of private corporations, and of the real nature of an ultra vires contract, served to bring about the confusion to which we have adverted.

Estoppel Arising from Receipt of Benefits.—We have already said that the plea of ultra vires, either when made for or against a corporation, will not be sustained when it will not advance justice, but on the contrary, will promote injustice. When the plea of ultra vires is excluded, it is generally upon the ground of estoppel, it being well settled that neither party to an ultra vires contract will be allowed to plead ultra vires while at the same time retaining benefits received thereunder: *Memphis etc. R. R. Co. v. Dow*, 19 Fed. Rep. 388; *American Nat. Bank v. National Wall Paper Co.*, 77 Fed. Rep. 85; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69; *Macon etc. R. R. Co. v. Georgia R. R. Co.*, 63 Ga. 103; *People's Gas Light etc. Co. v. Chicago Gas Light etc. Co.*, 20 Ill. App. 473; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Heims Brewing Co. v. Flannery*, 137 Ill. 309; *Kadish v. Garden City etc. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256; *People v. Suburban R. R. Co.*, 178 Ill. 594; *State Board v. Citizens' Street Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St.

Rep. 412; *White v. Marquardt*, 105 Iowa, 145; *Sherman Center Town Co. v. Fletcher*, 43 Kan. 282, 19 Am. St. Rep. 134; *Canal etc. R. R. Co. v. St. Charles Street R. R. Co.*, 44 La. Ann. 1069; *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 39 Am. St. Rep. 467; *Dewey v. Toledo etc. R. R. Co.*, 91 Mich. 351; *Grohmann v. Brown*, 68 Mo. App. 630; *Williams v. Bank of Commerce*, 71 Miss. 858, 42 Am. St. Rep. 503; *Linkauf v. Lombard*, 137 N. Y. 417, 33 Am. St. Rep. 743; *Seymour v. Spring Forest Cemetery Assn.*, 144 N. Y. 333; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Manchester etc. R. R. Co. v. Concord R. R. Co.*, 66 N. H. 100, 49 Am. St. Rep. 582; *Camden etc. R. R. Co. v. Mays' Landing etc. R. R. Co.*, 48 N. J. L. 530; *Oil Creek etc. R. R. Co. v. Pennsylvania Transportation Co.*, 83 Pa. St. 160; *Williamson v. Eastern etc. Assn.*, 54 S. C. 582; *Horton v. Long*, 2 Wash. 435, 26 Am. St. Rep. 867; *Tootle v. First Nat. Bank*, 6 Wash. 181; *McElroy v. Minnesota etc. Horse Co.*, 96 Wis. 317. *Contra*, *Chambers v. Falkner*, 65 Ala. 448; *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931; *Miller v. Insurance Co.*, 92 Tenn. 167; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352.

The courts which deny that such an estoppel arises under the circumstances mentioned, base their holdings upon various grounds. In *City Council v. Montgomery etc. Plank Road Co.*, 31 Ala. 76, the court adverted to the proposition just stated and said: "If this doctrine be established, these corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature have withheld. A proposition so erroneous can scarcely need argument to overturn it." See, also, *Marion Sav. Bank v. Dunkin*, 54 Ala. 471. Thus, in *Miller v. Insurance Co.*, 92 Tenn. 167, the court having fairly stated the grounds upon which this application of the law of estoppel rests, sums up its own views in these sentences: "It seems to us that the true foundation of the doctrine of *ultra vires* lies in the proposition that every act of a corporation in excess of its power is an act in contravention of public policy, and, for that reason, to be held null and void. The ground upon which corporate privileges are conferred is, that the public interests may be thereby subserved. If this be not so, then all such concessions are mere acts of legislative favoritism, and contravene the foundation upon which free government is supposed to rest—that all are to be protected in the enjoyment of equal rights and privileges. . . . It must be, therefore, that any act in excess of these granted powers is an act contrary to public policy, and, upon that ground, illegal and void." The court approves the English rule that, as to such contracts, there can be no ratification or estoppel.

But the reasoning of these cases is not convincing. The interest which the public, or the state, has in the business transactions of private corporations is greatly exaggerated. Such exaggeration is traceable to the earlier times when corporations were mostly public or quasi public, in which the public had more than an imagi-

nary interest. When it is shown that a corporation of the present day is abusing its corporate privileges, 'effectual means of conserving the public interest are found in proceedings brought by the state to forfeit the charter of the offending corporation. In the meantime, the interest of private individuals who have dealings with corporations is important, and it seems to us that since there is an adequate and proper remedy available to the state to confine corporate transactions within proper limits, the law should also protect private parties from the "aggressions" of corporations. The legal evolution of private corporations has brought them close to the status of private individuals, or associations of individuals, and in their private dealings they should be subject to the same rules of law which prohibit fraud and unfair dealing between man and man. Otherwise their charters, granted by the state in the furtherance of the public interest, become mere special dispensations authorizing an infinite variety of wrong and oppression. The proper rule is, that when a transaction is complete, and the party seeking relief has performed on his part, the plea of ultra vires is inadmissible in an action brought against the corporation for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status: *Camden etc. R. R. Co. v. Mays Landing etc. Co.*, 48 N. J. L. 530. The same rule should protect a corporation which on its side has in good faith performed an ultra vires contract. The doctrine of estoppel, however, has no application in favor of one furnishing goods to a third person on the ultra vires order of a corporation. This was held upon the ground that there had been no receipt of benefits by the corporation: *Famous Shoe etc. Co. v. Eagle Iron Works*, 51 Mo. App. 66. Nor does estoppel by receipt of benefits apply to a covenant to pay advance rent for future occupation under an ultra vires lease, because the consideration for the promise is not the past but the future use of the property: *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 23 Fed. Rep. 232.

Of the Remedy where an Ultra Vires Contract has been Partly Performed.—Where an ultra vires contract of a corporation has been performed, either partially or entirely, by one of the parties to it, it is unanimously conceded that the party who has so performed has enforceable rights. How are his rights to be enforced? Do they arise out of the contract, or outside of it? To these questions our courts give an inharmonious response. If all of the courts recognized a distinction between a contract that is illegal and one that is simply ultra vires, their disagreement might be avoided. An illegal contract cannot be sued upon nor enforced, so if it be conceded that the distinction mentioned does not exist, it follows of necessity that no performance or ratification of an ultra vires contract will enable suit to be brought upon it. We have already expressed our opinion that the distinction does exist, and we think it supported both by reason and authority. The term "ultra vires" does not apply to illegal or immoral contracts in the proper sense, and actions upon ultra vires contracts which are also illegal or immoral cannot be allowed. Such contracts constitute a separate

class, actions upon which are denied by the rule of law which denies a right of action upon illegal and immoral contracts generally. And we think it an eminently just and sensible rule, which, when an ultra vires contract, not void because illegal, immoral, or contrary to public policy, has been wholly or partially performed on one side, and the benefits of such performance have been enjoyed on the other side, permits an action for relief to be brought directly on the contract. This rule is well supported by authority: *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 23 Fed. Rep. 232; *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 496; *Campbell v. Argenta Gold etc. Min. Co.*, 51 Fed. Rep. 1; *Southern Life Ins. etc. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Bank of the State v. Hammond*, 1 Rich. 281; *Grand Gulf Bank v. Archer*, 8 Smedes & M. 151; *Madison Avenue Baptist Church v. Baptist Church*, 73 N. Y. 82; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Peatman v. Light etc. Co.*, 100 Iowa, 245; *State Board v. Citizens' Street Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412; *Chicago etc. Ry. Co. v. Derkes*, 103 Ind. 520; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Kadish v. Garden City etc. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256; *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 128, 60 Am. Rep. 558; *People v. Suburban R. R. Co.*, 178 Ill. 594; *Camden etc. R. R. Co. v. Mays Landing etc. R. R. Co.*, 48 N. J. L. 530; *Arkansas Valley Town etc. Co. v. Lincoln*, 56 Kan. 145; *Sherman Center Town Co. v. Fletcher*, 46 Kan. 524; *Argenti v. San Francisco*, 16 Cal. 255; *Union Water Co. v. Murphy's Flat etc. Co.*, 22 Cal. 621; *Main v. Casserly*, 67 Cal. 127; *North Hudson Mut. etc. Assn. v. First Nat. Bank*, 79 Wis. 31; *McElroy v. Minnesota Percheron Horse Co.*, 96 Wis. 317; *Dewey v. Toledo etc. Ry. Co.*, 91 Mich. 351; *Chapman v. Ironclad Rheostat Co.*, N. J., Nov. 1898; *Holmes etc. Mfg. Co. v. Holmes etc. Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448; *Hamilton etc. Hydraulic Co. v. Cincinnati etc. R. R. Co.*, 29 Ohio St. 341; *Rutland etc. R. R. Co. v. Proctor*, 29 Vt. 93; *Johnson v. Mason Lodge No. 33, Ky. Ct. of Appeals*, June, 1899.

Where an ultra vires contract is also void because illegal, immoral, or contrary to public policy, it cannot, though executed by one party, be enforced by him: *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203. Performance by either party does not estop the other to plead the invalidity of the contract as a defense to an action thereon: *Visalia Gas etc. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105. A contract that is unlawful as being against the express provisions or general policy of any particular statute is void and will not be enforced by the courts: *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626. See, also, *Win-scott v. Guarantee Inv. Co.*, 63 Mo. App. 367; *Grohmann v. Brown*, 68 Mo. App. 630; *Littlewort v. Davis*, 50 Miss. 403; *Denver Fire Ins. Co. v. McClellan*, 9 Colo. 11, 59 Am. Rep. 134. In the last case, a fire insurance company had, ultra vires, insured against hail. The insured having performed his part of the contract, and the company having received the benefit of such performance, the latter sought to escape liability under the policy on the ground that it was

ultra vires. In denying the company's right to set up such defense the court said: "It is argued on behalf of the appellant that the courts ought, in all such cases, to sustain the defense of ultra vires, here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits, and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defense of ultra vires. That the public has such an interest is quite true, but whether to afford such protection the defense of ultra vires is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal, in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which will allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligations of its contracts by pleading its own wrongdoing. Such policy would rather seem to offer a premium for dishonest dealing." A particular examination of the many cases cited above to the proposition that an action may be brought directly upon an ultra vires contract, where it has been executed on one side, and is not void from illegality, immorality, or because in violation of public policy, will indicate the habitual assurance with which corporations and private parties attempt to use the plea of ultra vires to further injustice.

That no Action can be Based upon an Ultra Vires Contract—Decisions of United States Supreme Court.—Opposed to the cases which, under the circumstances above recited, allow an action to be brought upon an ultra vires contract, there is a respectable array of authorities which deny that such a contract may be made the basis of an action under any circumstances. Chief among these latter are the decisions of the United States supreme court, which august tribunal has shown a distinct disinclination to fall in with the modern tendency toward liberalizing the ancient doctrine of ultra vires. According to the decisions of that court, a contract made by a corporation ultra vires is unlawful and void, and does not, by being carried into execution, become lawful and valid so that it may be sued upon: *Railway Cos. v. Keokuk Bridge Co.*, 131 U. S. 371. The views of the supreme court are thus expressed by Mr. Justice Gray in *Central Trans. Co. v. Pullman's Car Co.*, 139 U. S. 24: "A contract of a corporation which is ultra vires in the proper sense, that is to say, outside the object of its creation as defined by the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side

can give the unlawful contract any validity, or be the foundation of any right of action upon it." The doctrine so generally maintained that an estoppel to set up the defense of ultra vires arises from the receipt of benefits under an ultra vires contract is repudiated by the United States supreme court. The decisions supporting the foregoing are: *Pearce v. Madison etc. R. R. Co.*, 21 How. 441; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290; *Railway Cos. v. Keokuk Bridge Co.*, 131 U. S. 371; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *Jacksonville etc. Ry. v. Hooper*, 160 U. S. 514; *California Bank v. Kennedy*, 167 U. S. 362. According to these decisions, a suit to enforce rights growing out of dealings under an ultra vires contract must be brought, not upon the contract, but in disaffirmance of it.

In *Railway Co. v. McCarthy*, 96 U. S. 258, Mr. Justice Swayne, speaking for the court, said: "The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." This was a direct statement of the doctrine of estoppel arising from a receipt of benefits, and was a step in the right direction, but in view of the established doctrines of the court for which the learned justice spoke, it becomes meaningless except as indicating a rebellion against the rigor of those doctrines. In *Thomas v. Railroad Co.*, 101 U. S. 71, which was a suit to enforce the unexecuted portion of an ultra vires lease, the court expressly approved the rule that the executed dealings of corporations, though invalid for want of corporate power, shall remain as the foundation of rights acquired by the transaction, but held that such rule did not apply to the case in hand. So in *Hitchcock v. Galveston*, 96 U. S. 341, which, however, was an action against a municipal corporation, the court recognized the distinction, which we have already urged, between a case where there is a defect in the power of a corporation to make a contract and one where the contract is directly violative of its charter or statute. In the former case, the contract is said to be, "at farthest, only ultra vires; and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." Cited and approved in *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294. So, in *Jacksonville etc. Ry. Co. v. Hooper*, 160 U. S. 514, the court expressly reaffirms its adherence to the doctrines established by its previous decisions, but says that in the application of the doctrine of ultra vires "the court must be influenced somewhat by the special circumstances of the case," and, in effect, should not hold a contract of a corporation ultra vires to the prejudice of innocent parties, unless there is nothing upon which to base a contrary conclusion. The outworking of such a doctrine must, it seems to us, tend to defeat the very end of the doctrine of ultra vires as adhered to by the court, for it will result

In allowing corporations to add to their corporate powers by simply exceeding them and drawing in intervening equities to help them out. In *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290, Mr. Justice Bradley, with whom Mr. Justice Harlan concurred, dissented from the prevailing opinion of the court, saying in part: "The contract has been performed on the part of the lessor company, and the lessee and its guarantors have enjoyed the benefit of it. With what face can they now refuse to pay what they have agreed to pay? With what face can they plead incapacity to contract? This is not a suit to compel the specific performance of the contract in future; but to compel the payment of money earned by past performance of the contract. It seems to me that the companies concerned are estopped to deny their liability to make this payment."

That no Action may be Brought upon an Ultra Vires Contract—Decisions of State Courts.—The doctrines of the United States supreme court as we have stated them have been adhered to in some of the states, where it is held that a contract made by a corporation which is unlawful and void because ultra vires does not, by being carried into execution, become lawful and valid, and that the proper remedy of an aggrieved party is to sue, not upon the contract, but in disaffirmance of it: *Brunswick Gas Light Co. v. United Gas etc. Co.*, 85 Me. 532, 35 Am. St. Rep. 385. No performance on either side, it is maintained, can give validity to such a contract or enable suit to be brought upon it: *Marble Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71. No action lies upon the invalid contract; no decree can be made by a court of equity for its specific enforcement, nor a recovery had at law for its breach: *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 70 Miss. 669, 35 Am. St. Rep. 681. The state court decisions upholding these propositions, in addition to those already cited, are: *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Miller v. Insurance Co.*, 92 Tenn. 167; *Chambers v. Falkner*, 65 Ala. 448; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695; *Davis v. Old Colony R. R.*, 131 Mass. 258, 41 Am. Rep. 221; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

Recovery for Benefits Received.—A comparison of the opposing propositions to which we have cited authorities reveals the fact that the point of disagreement is not vital, but rather technical in its nature. As we have already stated, all the cases agree that where one in reliance upon an ultra vires contract entered into by him in good faith, makes expenditures or incurs prejudice, the mere fact that the contract is ultra vires does not deprive him of the right to recover. The question upon which the cases disagree is as to the manner in which he may enforce such right. Those courts which deny his right to sue upon the contract, without exception admit that he may recover by a suit in disaffirmance of the contract. In this connection it is said in *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24: "A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts,

while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." To this statement might be cited all of the cases just cited to the proposition that under no circumstances may an action be maintained upon an ultra vires contract.

The action brought may be for money had and received: *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781; *Morville v. American Tract Soc.*, 123 Mass. 129, 25 Am. Rep. 40. Assumpsit for work and labor on account of engraving bank bills will lie against a corporation, although such corporation is prohibited by law from engaging in the business of banking: *Underwood v. Newport Lyceum*, 5 B. Mon. 129, 41 Am. Dec. 260. Where a corporation has enjoyed the benefit of the consideration for an ultra vires contract, an implied assumpsit rises against it: *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453. A common remedy is by suit for an accounting. If a corporation has received the benefit of performance by the other party to an ultra vires contract, it will be required in equity to account to such other party for what is due him under the contract: *Boyd v. American Carbon Black Co.*, 182 Pa. St. 206; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98. Where a corporation has received a large consideration for a contract ultra vires for the sale of a telegraph franchise, it will be restrained from resuming possession of said franchise and the property connected therewith, until an accounting and settlement can be had between the parties: *American Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 188. And a court of equity, in setting aside an ultra vires construction contract at the instance of railroad company, may compel the company to account to the other party for benefits received from a partial performance: *New Castle Northern R. R. Co. v. Simpson*, 23 Fed. Rep. 214. If one railroad company has used the road, rolling stock, and equipments of another under a contract, it is estopped to set up that such contract is ultra vires when sued for an accounting and return of the property: *Manchester etc. R. R. Co. v. Concord R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582. See, also, *Manville v. Belden Min. Co.*, 17 Fed. Rep. 425; *Miller v. Insurance Co.*, 92 Tenn. 167. And, generally, an action in the nature of quantum meruit is an effective remedy, where one has expended labor or parted with property in bona fide reliance upon an ultra vires contract of a corporation: *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 70 Miss. 669, 35 Am. St. Rep. 681; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352; *Davis v. Old Colony R. R.*, 131 Mass. 258, 41 Am. Rep. 221; *Farmers' Loan etc. Co. v. St. Joseph etc. R. R. Co.*, 1 McCrary, 247; *Roberts v.*

Deming Woodworking Co., 111 N. C. 432; Brunswick Gas Light Co. v. United Gas etc. Co., 85 Me. 532, 35 Am. St. Rep. 385; Railway Cos. v. Keokuk Bridge Co., 131 U. S. 371; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24. Compare Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co., 118 U. S. 290.

Before a corporation will be allowed to repudiate its ultra vires contract it will be compelled to restore and repay the consideration received: Williams v. Bank of Commerce, 71 Miss. 858, 42 Am. St. Rep. 503. Equity will not, at the instance of a corporation, rescind an agreement as ultra vires after the parties have acquiesced therein for more than fifteen years, and large expenditures have been incurred and improvements made upon the faith thereof, and the corporation has received commensurate benefits and been relieved of burdensome obligations: Odd Fellows' Assn. v. Hegele, 24 Or. 16. And, in general, equity will insist upon a return of the consideration received under an ultra vires contract before decreeing the rescission thereof: American Union Tel. Co. v. Union Pac. Ry., 1 McCrary, 188; Madison Avenue Baptist Church v. Oliver Street Baptist Church, 73 N. Y. 82; Brown v. Atchison, 39 Kan. 37, 7 Am. St. Rep. 515; Memphis etc. R. R. Co. v. Dow, 19 Fed. Rep. 389. Though money is loaned under an ultra vires contract, the ultra vires character of the contract will not defeat a recovery of the money so loaned: Gold Min. Co. v. National Bank, 96 U. S. 640; West v. Madison County etc. Board, 82 Ill. 205; Kadish v. Garden City etc. Assn., 151 Ill. 531, 42 Am. St. Rep. 256; Germantown Farmers' etc. Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Bowditch v. New England Mut. Life Ins. Co., 141 Mass. 292, 55 Am. Rep. 474; Poock v. Lafayette Building Assn., 71 Ind. 357; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Steam Nav. Co. v. Weed, 17 Barb. 379. Contra, Grand Lodge v. Waddill, 30 Ala. 313. Whether or not securities given for money loaned ultra vires are valid and enforceable is a doubtful question: North River Ins. Co. v. Lawrence, 3 Wend. 482; Germantown Mut. Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549; Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425; Macon etc. R. R. Co. v. Georgia R. R. Co., 63 Ga. 103; Life etc. Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531. Where a corporation is expressly forbidden by its charter to loan money upon other than specified securities, it cannot recover upon securities of another character, but where no such prohibition exists, and a corporation is not expressly forbidden by its charter to loan money, no reason is apparent that it should not be allowed to enforce securities given for the loan. Where a corporation gives in security for a loan its bonds issued in violation of law, neither the corporation nor a stockholder thereof, who as president participated in the unlawful issue of the bonds, can maintain a suit in equity for a surrender or cancellation of the bonds. The doctrine of *in pari delicto* applies: Hinckley v. Pfister, 83 Wis. 64. Canal boats bought by a railroad ultra vires become its property: Parish v. Wheeler, 22 N. Y. 494; and machinery acquired by a corporation ultra vires cannot be

seized by creditors of the vendor to pay his debts: *Edwards v. Fairbanks*, 27 La. Ann. 449.

A lease by one railroad corporation to another of its property and franchises for a long period of years, which is ultra vires of one or both corporations, will not be set aside in equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract: *St. Louis etc. R. R. Co. v. Terre Haute etc. R. R. Co.*, 145 U. S. 393. Though a lessee may throw up an unexpired ultra vires lease and refuse to pay rent for the remainder of the term, and under ultra vires contracts generally one may refuse to complete his performance begun upon: *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 23 Fed. Rep. 232; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290. Compare *Heims Brewing Co. v. Flannery*, 137 Ill. 309. Where one has furnished and received payment for part of the goods agreed to be furnished under an ultra vires contract with a corporation, he may refuse to furnish any more thereunder: *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352.

Duty of Persons Dealing with Corporations to Know the Scope of Their Powers.—It is a much reiterated rule in the law of private corporations that persons dealing with them are deemed to have notice of the scope of their powers as conferred in the instruments of their creation and as had under the law generally. The rapid development of the corporation idea, the multiplication in myriad form and variety of corporations, and the extreme complexity of the laws governing them, must make apparent to the most superficial student that a strict adherence to this rule of the law of notice must entail endless injustice, not to say, involve infinite absurdity. This rule lies at the foundation of the doctrine of ultra vires as it was originally conceived. It is maintained by many cases that one who has incurred expenses or parted with property under an ultra vires contract made by him with a corporation, has no claim to enforce it because he is held to have had constructive notice of the capacity of the corporation, so that he parted with his property with knowledge that the contract was illegal and void: *Chambers v. Falkner*, 65 Ala. 448; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695; *Hood v. New York etc. R. R. Co.*, 22 Conn. 1. He cannot plead ignorance in avoidance of the defense of ultra vires: *Franklin Co. v. Lewiston Inst.*, 68 Me. 43, 28 Am. Rep. 9; *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482; *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798. See, also, *Railway Cos. v. Keokuk Bridge Co.*, 131 U. S. 371; *St. Louis etc. R. R. Co. v. Terre Haute R. R. Co.*, 145 U. S. 393. These rigid rules must, however, be qualified, and the proper qualification is suggested in *Bissell v. Railroad Cos.*, 22 N. Y. 258, by Seldon, J., thus: "Where the want of power is apparent upon comparing the act done with

the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped to deny that which, by assuming to make the contract, it had virtually affirmed." Quoted and approved in *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322. See, to same effect, *Miller v. Insurance Co.*, 92 Tenn. 167; *Ossipee Hosiery etc. Mfg. Co. v. Canney*, 54 N. H. 295. Although it would be ultra vires of a corporation to build and operate a railroad, it may nevertheless be liable for "railroad supplies" purchased and used by it where the goods purchased were not of such character as to charge the seller with notice that the corporation could not use them in its legitimate business, and where the seller had no notice that the goods were not to be used in such business: *Luttrell v. Martin*, 112 N. C. 593.

It is held, too, that one who sells stock to a corporation, although he knows that the corporation is purchasing to sell again as a speculation, contrary to a penal provision in the charter, may nevertheless recover, on an implied assumpsit, the value of the stocks; otherwise when the contract provides for the illegal use of the thing sold or when the seller does any act to promote it. *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132. Nor can a corporation avoid the payment of borrowed money on the ground that, although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money was to be used in such business, provided the business itself was free from any intrinsic immorality or illegality: *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656. See *Parish v. Wheeler*, 22 N. Y. 494; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412; *Thompson v. Lambert*, 44 Iowa, 239. But the same cases affirm that the rule is otherwise where the contract provides for the illegal use of the money or the lender does anything to promote such use. The doctrine of ultra vires will not enable a corporation to resist the payment of a debt because in excess of its statutory limit, where the creditor had no notice of such fact: *Ossipee Hosiery etc. Mfg. Co. v. Canney*, 54 N. H. 295; *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; *Humphrey v. Patrons' Mercantile Assn.*, 50 Iowa, 607; *Auerbach v. La Sueur Mill Co.*, 28 Minn. 291, 41 Am. Rep. 285. The rule requiring persons dealing with corporations to take notice, at their peril, of the scope of the corporate powers, yields to the general rule protecting bona fide holders of negotiable paper when the transaction in question involves the rights of such holders without

notice of corporate negotiable paper issued ultra vires: *Lehigh Valley Coal Co. v. West Depere Agricultural Works*, 63 Wis. 45; *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; *Auerbach v. La Sueur Mill Co.*, 28 Minn. 291, 41 Am. Rep. 285; *Bailey v. Methodist etc. Church*, 71 Me. 472; *National Bank v. Young*, 41 N. J. Eq. 531; *Mechanics' Bkg. Assn. v. Saugerties White Lead Co.*, 35 N. Y. 504; *Credit Co. v. Howe Machine Co.*, 54 Conn. 357, 1 Am. St. Rep. 123; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322. Though the rule applies here as elsewhere that where a corporation is not authorized to give its notes for any purpose persons taking such notes are deemed to have notice of the defect of power and cannot recover thereon: *Bailey v. Methodist etc. Church*, 71 Me. 472.

Of the Doctrine that only the State may Raise the Question of Ultra Vires.—In the meantime, the disintegration of the ancient doctrine of ultra vires has proceeded from another direction. The most important of the propositions upon which the doctrine is based is that the public which confers corporate powers has the right to insist that these powers be not exceeded. In case of usurpation or abuse of its powers by a corporation, this public right is effectively enforceable by proceedings to forfeit the charter or franchise of the corporation. It is not ordinarily proper to raise questions of public right in private actions; in other words, where there is a transgression of a public right, the initiation of proceedings to punish such transgression is ordinarily made by the state. So there has been growing up a doctrine, as yet in a rather nebulous state, and the outcome of which cannot be clearly seen, that the question of ultra vires, as applied to the transactions of corporations, can only be raised by, or at the instance of, the state: *Barrow v. Nashville etc. Turnpike Co.*, 9 Hump. 304; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621; *Grand Gulf Bank v. Archer*, 8 Smedes. & M. 151; *Oil Creek etc. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160; *National Bank v. Matthews*, 98 U. S. 621; *Jones v. Guaranty etc. Co.*, 101 U. S. 622; *Southern Pac. R. R. Co. v. Orton*, 6 Saw. 157; *State v. Minnesota Thresher etc. Co.*, 40 Minn. 213; *St. Louis Drug Co. v. Robinson*, 81 Mo. 19; *Prescott Nat. Bank v. Butler*, 157 Mass. 548; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208; *Southern Life Ins. etc. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Hovelman v. Kansas City etc. R. R. Co.*, 79 Mo. 632. The rule, however, cannot be stated as broadly as this. It is simply a step beyond the well-settled rule that the legal existence of a de facto corporation cannot be questioned in a collateral proceeding: *Bushnell v. Consolidated Ice Co.*, 138 Ill. 67; *Johnson v. Mason Lodge No. 33, Ky. Ct. of Appeal*, Jan. 1899. And exceptions to it are recognized, as where the charter of the corporation in question specifies and limits the business in which it may engage, and expressly, or by fair implication, invalidates transactions outside of its legitimate corporate business: *St. Louis Drug Co. v. Robinson*, 81 Mo. 19. It is also limited in *State v. Minnesota Thresher etc. Co.*, 40 Minn. 213, thus: "But in case of excess of powers, it is only where some public mischief is done

or threatened that the state, by the attorney-general, should interfere. If, as between the company and its stockholders, there is a wrongful application of the capital, or an illegal incurring of liabilities, it is for the stockholders to complain. If the corporation is entering into contracts *ultra vires*, to the prejudice of persons outside the corporation, such as creditors, it is for such persons to take steps to protect their interests."

That the question of *ultra vires* may be raised otherwise than by the state cannot be doubted, under the law as it now stands. It is said: "The objection may come from the state, from a dissenting stockholder, or from the party with whom the contract is made. And the courts often give a different meaning to the term according to the source whence the objection comes. An act or a contract may be *ultra vires* if the state objects when it would not be so held if the objection came from a stockholder or from a contracting party: *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336. When the action of a corporation is challenged by the sovereign which gave it existence, or by whose favor it is permitted to pursue its business, it may be required to show a clear warrant for the acts called in question; while in suits between individuals or corporations, or between corporate bodies where private rights only are involved, the rule is not inflexible, and yields to considerations of right and justice: *Central Ohio Nat. Gas. etc. Co. v. Capital City Dairy Co.*, 60 Ohio St. 96; *Chicago etc. Ry. Co. v. Union Pac. Ry. Co.*, 47 Fed. Rep. 15; *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47. When the state challenges the legality of the transaction, the paramount and only question is, whether it has bestowed upon the company the requisite authority to engage in it. When the question arises between the company and the other party to the contract other legal principles apply in determining whether the contract shall be observed: *Camden etc. R. R. Co. v. May's Landing etc. R. R. Co.*, 48 N. J. L. 530. See *Lucas v. White Line Transfer Co.*, 70 Iowa, 541, 59 Am. Rep. 449; *Littlewort v. Davis*, 50 Miss. 403. One whose rights are not invaded cannot complain that a corporation is acting *ultra vires*. In such case only the state or stockholders can complain: *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192; *New Orleans etc. R. R. Co. v. Ellerman*, 105 U. S. 166; *Jersey City Gaslight Co. v. Consumers' Gas. Co.*, 40 N. J. Eq. 427; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763; *Smith v. First Nat. Bank*, 45 Neb. 444; *Erhman v. Union Cent. etc. Ins. Co.*, 35 Ohio St. 324. The right of one or more stockholders in a corporation to maintain a suit to restrain the corporation from entering into or performing *ultra vires* contracts, is recognized in many other decisions: *Davis v. Old Colony R. R.*, 131 Mass. 258, 41 Am. Rep. 221; *Bliss v. Anderson*, 31 Ala. 612, 70 Am. Dec. 511; *Pratt v. Pratt*, 33 Conn. 446; *Board of Commrs. v. Lafayette etc. R. R. Co.*, 50 Ind. 85; *Smith v. Bangs*, 15 Ill. 400; *Teachout v. Des Moines etc. St. Ry. Co.*, 75 Iowa, 722; *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685. These cases pertain more closely to the law of agency, for

they are usually instituted to restrain the officers of a corporation from acting or contracting beyond the scope of their agency. So stockholders cannot complain where they all consent to the construction and maintenance of a new enterprise authorized by a supplemental charter, but not within the grant of the original charter: *Zabriskie v. Hackensack etc. R. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617. A stockholder cannot question the vires of a contract made by a corporation while the corporation retains the benefits of the contract: *Buford v. Keokuk etc. Packet Co.*, 69 Mo. 611. See *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337. When a corporation enters into a contract which under no circumstances it has power to make, the contract is held to be void as to creditors, although assented to by all of its stockholders: *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165. But where the indebtedness that a corporation is authorized by its charter to contract is limited, the objection that a mortgage for a sum in excess of this amount is ultra vires cannot be successfully urged by an unsecured creditor, who became such after the mortgage was executed, and whose claim is open to the same objection: *Allis v. Jones*, 45 Fed. Rep. 149.

Conclusion.—After a study of the cases upon the subject of this note, the impression is forced upon us that the doctrine of ultra vires, as applied to the contracts of private corporations, has almost lost its meaning. The undermining of the foundation upon which it has rested from its inception has proceeded simultaneously from different directions until the doctrine itself seems almost ready to fall of its own weight. The original rule, that an ultra vires contract was illegal and void, could give rise to no rights, nor be validated by any performance or application of the law of estoppel, has practically been erased from the law, for those courts which do not contradict it directly do so indirectly by their manner of applying it. An appeal to the public interest that private corporations should be restricted in the making of contracts to the scope of their granted powers is growing more and more ineffectual where the rights of persons innocently entering into ultra vires contracts with such corporations intervene. Mr. Seymour D. Thompson says: "My own view is, that the doctrine of ultra vires has no proper place in the law of private corporations except in respect of contracts which are bad in themselves, the making of which is prohibited by considerations of public morality, of justice, or of a sound public policy, and which, therefore, stand upon such a footing that neither party can be regarded as innocent or blameless in entering into them": *Am. Law Rev.* 28, 397, 398. That the trend of the cases is toward the adoption of this advanced view admits of little doubt, and it may be suggested that contracts of corporations "which are bad in themselves" are generally sufficiently provided for in our law without any reference to the doctrine of ultra vires.

HASBROUCK v. WESTERN UNION TELEGRAPH CO.

[107 IOWA, 160.]

AGENCY—AUTHORITY OF AGENT—ERRONEOUSLY TRANSMITTED TELEGRAM.—Where an agent, sent by a banking firm to settle and adjust a claim against a third person, telegraphs his principal: "Has stock twelve hundred dollars. Mortgage on for fifteen hundred dollars. Am offered note, with Harkness as surety, for twenty-five hundred dollars, due in eighteen months, in full settlement," and the telegram is erroneously transmitted to read thus: "Have secured twelve hundred dollars mortgage on fifteen hundred dollars and offered note, with Harkness as surety, for twenty-four hundred dollars," et cetera, to which the principal answers: "If twelve hundred mortgage is on fifteen hundred dollars property, accept," the agent is justified in understanding that he is to accept the offer of settlement under the facts as he had stated them, unless the conditions are more favorable to plaintiff than they would be with a twelve hundred mortgage on a fifteen hundred dollar stock, and a settlement based upon and within such an understanding is binding upon the principal.

AGENCY—NEGLIGENCE OF PRINCIPAL—ERRONEOUS TELEGRAM.—Where a principal, being in doubt as to the meaning of a telegram from his agent relating to the matter of the latter's agency, requires the telegraph agent to have the message repeated and the latter reports that the message as received is correct, the principal is not guilty of contributory negligence, as a matter of law, in acting upon the message as he understands it.

TELEGRAPH COMPANIES—DAMAGES FOR ERRONEOUSLY TRANSMITTED MESSAGE—DUTY OF PLAINTIFF TO RESCIND CONTRACT ENTERED INTO IN RELIANCE UPON.—Where a principal has been influenced through the erroneous transmission of a telegram from his agent to authorize the latter to enter into a contract of settlement with the former's creditor which he would not have authorized except for such erroneous transmission, he is not bound to take steps to rescind the contract before bringing suit against the telegraph company for damages suffered.

INSTRUCTIONS—ERRONEOUS SUBMISSION TO JURY OF MATTER OF LAW.—It is harmless error for the court to submit to the jury the question of interpretation of a telegram conferring certain authority upon an agent, when, from the verdict rendered, it is apparent that the interpretation adopted by the jury gave to the telegram the meaning which, as a matter of law, was proper.

INSTRUCTIONS—IMMATERIAL ERROR.—Erroneous instructions as to the interpretation to be given a doubtful telegram, when without prejudice, are not ground for reversal.

TELEGRAPH COMPANIES—ACTION FOR ERRONEOUS TRANSMISSION OF MESSAGE—EVIDENCE.—In an action against a telegraph company for damages resulting from a contract entered into in reliance upon an erroneously transmitted message, the plaintiff is properly allowed to testify that the contract in question would not have been entered into except for such error on the part of the defendant.

APPEAL—ERROR FIRST OBJECTED TO ON APPEAL.—It cannot be first objected to on appeal that evidence, properly admissible for a certain purpose, was admitted without instruc-

tions limiting its application to such purpose, where no request was made for such instructions.

Action for damages resulting to plaintiff from a contract entered into in reliance upon an erroneously transmitted telegram sent from plaintiff's agent to him. The agent was sent by the plaintiff, a banking firm, to adjust and settle a claim held by the plaintiff against one Henderson upon a note for three thousand six hundred dollars. Having looked into the matter the agent telegraphed his principal: "Has stock twelve hundred dollars. Mortgage on for fifteen hundred dollars. Am offered note, with Harkness as surety, for twenty-five hundred dollars, due in eighteen months, in full settlement. Shall I accept? Answer quick, care Leggett House. R. C. Poston." The message as delivered to plaintiff was as follows: "Have secured twelve hundred dollar mortgage on fifteen hundred dollars and offered note, with Harkness as surety, for twenty-four hundred dollars," et cetera. To the message received the plaintiff telegraphed in reply: "If twelve hundred dollar mortgage is on fifteen hundred dollar property, accept." On receipt of this telegram Poston, the agent, settled with Henderson, taking his note for twenty-five hundred dollars, secured as promised. The loss complained of was of eleven hundred dollars, representing the twelve hundred dollar mortgage expected by the plaintiff, less the one hundred dollars by which the note secured exceeded that promised. Appeal from verdict and judgment in favor of the plaintiff.

McNett & Tisdale and George H. Fearons, for appellant.

Miles & Steele, for the respondent.

¹⁶² GRANGER, J. 1. It is contended that, independent of the telegraphic correspondence, Poston had authority to make the settlement; and the first proposition argued is this: "Did the dispatch written at Fairfield, taken in connection with the reply which Poston received thereto, constitute apparent authority on his part to effect the settlement which he did, or was he justified in drawing that conclusion?" It seems to us that the proposition is very fairly stated to test the legal question involved. It probably will not be disputed ¹⁶³ that there must have been a binding settlement with Henderson, before damages legally accrued to plaintiff; and a binding settlement, as to plaintiff, could only arise from such a delegation of authority as that, in the exercise of it, he would be bound. Appellant argues the question on the theory that Poston had the right to consider

the answer to his dispatch on the assumption that his dispatch to plaintiff was correctly transmitted, and we think the method of reasoning correct. Appellant then takes this position: The Poston dispatch notified plaintiff that there was a stock worth twelve hundred dollars, on which there was a fifteen hundred dollar mortgage, and a secured note for two thousand five hundred dollars was offered in settlement. The answer was: "If twelve hundred dollar mortgage is on fifteen hundred dollar property, accept." Now, leaving out of mind the erroneous dispatch, we may see the exact conditions under which Poston acted and determine the question of his authority. It is said the authority to accept was conditional on there being a twelve hundred dollar mortgage on a fifteen hundred dollar stock, and not on there being a fifteen hundred dollar mortgage on a twelve hundred dollar stock, and that plaintiff had a right to impose an arbitrary condition. Without doubt, it had that right; and the query comes, Did it impose such a condition? That is, was Poston justified in construing the dispatch as authorizing the settlement only upon a literal construction of the dispatch, or was he to treat the words imposing the condition as meaning that there must not be a settlement less favorable to plaintiff? The situation and understanding of the parties have much to do with this construction, and the case is presented on that theory. From Poston's dispatch, as written by him, plaintiff would have known that the mortgage on Henderson's stock exceeded its value by three hundred dollars. It would be known to be an estimate. When the answer came, Poston would read it as if plaintiff knew what he (Poston) had said. ¹⁶⁴ and he must have understood that he was to accept the offer of settlement under the facts as he had stated them, and also that he was to accept, unless the conditions were more favorable to plaintiff than they would be with a twelve hundred dollar mortgage on a fifteen hundred dollar stock. We hazard little in saying that had Poston's dispatch been correctly transmitted, and had the same answer been returned, both plaintiff and Poston would have so understood the matter, and that it would be the natural and reasonable conclusion from the premises. The case, from a legal point of view, differs little, if any, from facts like these: A is the agent for B for the purchase of horses. A writes to B and says: "I can buy horses of a certain class for one hundred dollars per head. Shall I purchase?" B answers, "If you can get them for ninety-five dollars per head, buy them." A buys them for

ninety dollars per head. No one would doubt his authority. Why? Because it is necessarily involved in the authority granted. The situation justifies a conclusion that the limitation arising from the conditional words is only against going further in one direction; that is, paying more. So in the case at bar. The conditional words imposed a limitation as to settlement only in case the stock, in value, exceeded the mortgage by more than three hundred dollars.

Appellant invokes some rules under the law of contracts, and cites numerous authorities, and among them Mechem on Agency, sections 294, 297, 303. We do not discover a word in these sections against our theory of this question. Appellant omits section 298, which we think quite significant, and we quote it, with the one preceding it: "Sec. 297. In this case, as in the other cases, the intention is to be gathered from the whole instrument, whether it be made of one piece of paper or of many." "Sec. 298. And so, in doubtful cases, resort must be had to the situation, surroundings, and relation of parties; for though the writing cannot, in general, be contradicted by oral evidence, ¹⁰⁵ yet the circumstances may properly be used as aids, and, by putting the court more or less fully into the exact situation of the parties, to enable it to see the subject matter as they saw it." Such is the method of inquiry we pursue in this case. The rule that, in the making of contracts by correspondence, the acceptance must be unconditional, is strongly urged as applicable in this case. With our view of the case, the acceptance was unconditional. That rule has application as between Henderson and plaintiff. When the answer came to Poston, it fixed his authority; and the acceptance followed that, and was unconditional. The only condition imposed was upon Poston, which, as we hold, was observed, so that his authority was complete. It is probably true that with our construction of the terms of the telegram, appellant would not urge the authorities cited as applicable.

2. Contributory negligence is pleaded, and urged against plaintiff. The claim is based first on the negligence of Poston, in that when he received the reply to his dispatch, it should have put him on inquiry, because of the language as to a twelve hundred dollar mortgage on a fifteen hundred dollar stock, instead of as it was expressed in the dispatch as written by Poston, and as to plaintiff, it is thought there was negligence because of the doubt and uncertainty arising from the dispatch as

delivered by the defendant. It does appear from the record that, when plaintiff received the telegram from Poston, its meaning was thought to be doubtful; and the agent at Humeston was asked if it was correct, and he said he would have it repeated, which he said he did, and that it was correct. The court submitted the question to the jury, and said in its instructions: "As to whether the plaintiff, under the circumstances shown, did all that reasonable, prudent men would do under like circumstances, and exercised reasonable care under the facts shown, will be a question for the jury to determine from the evidence. If they did, they are not guilty of contributory negligence in that regard. If they ¹⁰⁰ did not, they are guilty of contributory negligence, and cannot recover beyond the amount paid for the telegram, with interest." And to the negligence of Poston, the court said: "It is also alleged that plaintiffs were guilty of contributory negligence, for the reason that the plaintiffs' reply message to their agent, Poston, was of such a nature as to put him on his guard that they had not truly interpreted the message sent by him to them. The plaintiffs in the case at bar are responsible for the acts of their agent, Poston, and any negligence on his part in the performance of his duties would be imputed to plaintiffs. If the jury find that, under the circumstances shown, the said Poston did not use reasonable care, the plaintiffs would be held guilty of contributory negligence, and could not recover." We do not think the defendant has any ground for complaint on this branch of the case. As to the claim of negligence on the part of plaintiff, it could not be said to be negligence, as a matter of law, after the pains taken to know if the dispatch as received was correct; and, as to the negligence of Poston, the only doubtful question is if it does not affirmatively appear that he was not negligent. In this particular we may refer to our discussion in the first division of the opinion.

3. It is claimed that, after plaintiff knew of the mistake, it should have taken steps to rescind the contract of settlement; and reliance is placed on the familiar rule in *Greenleaf on Evidence*, section 261, and stated in *Beymer v. McBride*, 37 Iowa, 114, that: "It is a general principle of law, in case of a breach of a specific contract, that if the injured party can protect himself from damage, he is bound to do so, if practicable, at a moderate expense, or by ordinary efforts, and he can charge the delinquent party for such expense and efforts and for such damages

only as could not be prevented by the exercise of such diligence." We have found no case like this where such a rule has been applied. Appellant's claim in this respect is that: "As the extent and scope of Poston's authority to settle or compromise ¹⁶⁷ was measured and defined by the two telegrams, and Henderson knew of the contents of the one sent, and either knew or had opportunity of knowing the one received, he was bound by the extent of the authority which Poston in fact had, and was charged with notice of its limitations. Hence he was in no position to legally resist a rescission or repudiation of the settlement." In view of what we have already said, there is a very conclusive answer to the claim. The claim is that Henderson was bound by the extent of the authority, on the theory of the first dispatch being correctly transmitted; and, conceding Henderson's knowledge to have been the same as that of Poston, the same inferences as to authority would be justified. If the situation would justify Poston in accepting the settlement offered, it would justify Henderson in completing the transaction. We are not to be understood as determining this question on any other theory or claim than the one presented. The case of *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, is, in several particulars, like the one at bar. The facts in that case are substantially these: One Hedges, residing at Cedar Rapids, Iowa, was the agent for Reed, the plaintiff, residing at Kansas City, Missouri. Hedges filed with the company a dispatch to Reed as follows (omitting date, et cetera): "Offered thirteen hundred dollars cash, lot two, houses near planing mill. Must hear immediately. Can't get more." In transmission the word "thirteen" was changed to "nineteen," so that the offer to her was nineteen hundred dollars. She answered: "Sell property for amount offered. Will send deed Monday, 27." Hedges completed the agreement for the sale, and accepted part payment. When the deed came, it expressed a consideration of nineteen hundred dollars, and Hedges, thinking there might be a mistake, suggested waiting until he could write; but the purchaser refused and threatened suit, and the transaction was completed by accepting thirteen hundred dollars. The action was to recover the deficiency, to make up the amount of nineteen hundred dollars. The court permitted a ¹⁶⁸ recovery, and on the question of authority, which we have before considered, it said: "The defendant was fully advised of its importance on the face of the message; and, after being

so advised, its agent assured plaintiff that it had been repeated, and she could rely upon its correctness. In this way plaintiff was led to believe she was offered nineteen hundred dollars for her property. Being willing to part with it for that sum, she wired acceptance of the proposition made. The proposal was only thirteen hundred dollars, but in this way she was made to accept that proposal. Her agent was clothed, not only with apparent, but actual, authority to sell for thirteen hundred dollars so far as he was advised. Being thus empowered to sell, he made a binding contract, and accepted a part of the purchase money. The deed was forwarded, and he delivered it. All this was done upon reliance in the correctness of defendant's actions. Could a more natural consequence ever follow a transaction than this loss did upon the mistake of defendant?" In the same connection the court said upon the question of plaintiff's obligation to rescind: "Does it lie in defendant's mouth to speculate how plaintiff or her agent, by the exercise of care, which it failed to exercise, might have avoided her contract with the purchaser? Has the defendant the right to require plaintiff to enter upon a long and doubtful litigation to rescind the contract, which was fully executed by delivery of her deed, and the receipt of the purchase money? We most clearly think not. The cases cited by learned counsel do not meet this case. Here the damages are the direct result of defendant's negligence. Moreover, they had fully accrued when plaintiff discovered the mistake. There were no means of avoiding them, except to sue the blameless purchaser or the negligent company. She chose the latter course, and we think properly." In this case the note against Henderson for three thousand six hundred dollars had been surrendered, if not other securities, and the transaction was complete, so far as to make it binding between the parties.

169 4. The court, by its fifteenth instruction, left it to the jury to determine whether the telegram authorized Poston to make the settlement. This is said to be error, and that it was the duty of the court to construe the telegrams. Appellant's claim is made specific that Poston's authority must be determined by the two telegrams, omitting the erroneous one, and that it was the duty of the court to tell the jury what the two telegrams meant. We determine the question on that theory, and such is the rule we have so far observed. Under such a rule we need not determine the correctness of the instruction; for we had held that, as a matter of law, the telegrams gave

authority, and the jury must have so found, in order to return a verdict for plaintiff. Hence, no prejudice resulted from giving the instruction. In view of another objection to the same instruction, we set out the important part of it, as follows: "In regard to such defense, the jury are instructed that, in determining the true purport and meaning of the telegrams sent, the words used are to be taken in their usual and ordinary significance and meaning, and are to be interpreted in the light of the facts as they were known to the parties at the time. If the said Poston did not exercise reasonable care in interpreting and acting on the message received in view of the facts as he knew them, the plaintiffs cannot recover. [The mere fact, however, that said Poston did not follow the strict letter of his authority in the message sent him, as to whether the mortgage referred to was a twelve hundred dollar mortgage on a fifteen hundred dollar stock or a fifteen hundred dollar mortgage on a twelve hundred dollar stock, would not, alone, prevent a recovery, unless the jury find from the evidence that such departure occasioned, in whole or in part, the loss complained of.]" The part now complained of we have included in brackets. The complaint is, that it permits a departure from the strict letter of the authority granted, which is said to violate the rule. We read the instruction to mean, in the particular suggested, that, if there was otherwise a right of recovery, a departure from the strict letter not affecting ¹⁷⁰ such right would not defeat a recovery. It is saying, in effect, that an immaterial departure would be without prejudice. Surely such an instruction does not violate the law. A further complaint is made of the same instruction in the use of the words: "If said Poston did not exercise reasonable care in interpreting and acting on the message received, in view of the facts as he knew them, the plaintiffs cannot recover." The complaint is, that "although the jury should find that the interpretation put upon the message by Poston was not the true one, and they should find that Poston used reasonable care in his effort to interpret, but made a mistake, they would still find for the plaintiff." Appellant's conclusion is not warranted. But, aside from this, in view of the legal construction to be put on the telegrams, and that must have been put upon them in reaching the verdict, no prejudice could result. We think, as does appellant, that it was a question of correct interpretation, and we think it affirmatively appears that the verdict is in accord with such an interpretation,

because of which language complained of, even if erroneous, would be without prejudice.

5. Mr. Hasbrouck, a member of the plaintiff firm, was permitted to testify, as was also the other member, that if the telegram as filed by Poston for transmission had been received, they would not have sent the message they did send. There was no error in permitting the answers. It was a necessary fact to be shown under the issues, and it is difficult to imagine any other method of proving it. They were the only ones who knew the fact, and they did know. A state of facts so similar as to make the holding clear authority on this question is in *State Ins. Co. v. Jamison*, 79 Iowa, 245. We need add nothing to what we have said in that case. The rule has support in cases therein cited, and in *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454, 66 Am. St. Rep. 906.

6. Dr. McCulloch, one of the plaintiff firm, in connection with his testimony as to the meaning of the telegram ¹⁷¹ received from Poston was permitted to state that he then knew, or had an idea in regard to, the value of the stock of goods, and to state that, according to his idea, the value was about fifteen hundred dollars. It seems to be conceded in argument that, had had the court limited the application of the evidence as to what was in the witness' mind in interpreting the dispatch from Poston, it might have been proper. There is scarcely room to doubt that the jury so understood it, from the connection in which it was given. We have no doubt that it was proper for that purpose, and, if proper, the error was not in admitting it; but in a failure to limit its application. The court was not asked so to do, nor error assigned upon such a refusal or neglect.

The instructions given are without prejudicial error, and they so fairly submit the case that there was no error in the refusal of those asked. The evidence clearly sustains the verdict. The judgment is affirmed.

TELEGRAPH COMPANIES—CONTRIBUTORY NEGLIGENCE OF PARTY RECEIVING TELEGRAM.—Where the recipient of a telegraphic message sent from Staten Island, but appearing to have been sent from South Carolina, after going to the telegraph office to make inquiry and finding it closed, has been misled into taking a fruitless trip to South Carolina, it cannot be said as matter of law that he is chargeable with contributory negligence: *Tobin v. Western Union Tel. Co.*, 146 Pa. St. 375, 28 Am. St. Rep. 802.

TELEGRAPH COMPANIES—LIABILITY FOR ERRONEOUSLY TRANSMITTED MESSAGE.—Proof that a telegraphic message was not transmitted as it was delivered to the company, and that it was acted upon as received by the sendee, establishes a

prima facie case of negligence against the company: *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, and note. See *Rittenhouse v. Independent Line etc.*, 44 N. Y. 263, 4 Am. Rep. 673.

INSTRUCTIONS—NONPREJUDICIAL ERROR—FAILURE TO REQUEST INSTRUCTIONS.—Error cannot be based upon the failure of the trial court to give instructions when no request was made: *Wragge v. South Carolina etc. R. R. Co.*, 47 S. C. 105, 58 Am. St. Rep. 870, and note; *State v. Harrison*, 66 Vt. 523, 44 Am. St. Rep. 864. See monographic note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 118; *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629. If the result reached by the trial is correct, errors in giving or denying declaration of law, or in giving or denying instructions, must be treated as harmless on appeal: *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648.

CASEY v. CASEY.

[107 IOWA, 192.]

COTENANCY—ADVERSE POSSESSION—EVIDENCE.—To prove adverse possession by one cotenant of the land of the cotenancy, his declarations claiming sole ownership are admissible in evidence though not made in the presence of his cotenant.

COTENANCY—ADVERSE POSSESSION BETWEEN COTENANTS.—Exclusive occupancy by one tenant in common, accompanied by acts and declarations of sole ownership, if known to his cotenant, will amount to ouster so that his possession may ripen into title.

COTENANCY—ADVERSE POSSESSION BETWEEN COTENANTS—NOTICE.—In order that exclusive possession of the land of the cotenancy by one cotenant, accompanied by hostile acts and claims of ownership, may amount to an ouster of his cotenant, such acts and declarations must be known to the latter. Actual notice must be shown, but it may be by circumstantial evidence.

Willett & Willett, for the appellants.

L. Bullis, for the appellee.

¹⁹³ **WATERMAN, J.** Plaintiff is the widow of one Timothy Casey, who died in the year 1894. Her claim to the real estate in question is founded upon the will of her husband, in which it was devised to her. Timothy Casey and his brother, the defendant William Casey, obtained title to this land jointly, a part in the year 1858 and a part in 1860. In the deeds they were both named as grantees. Both went into possession, and they continued in the joint occupation of the premises until the year 1865, when William purchased another farm some three miles distant, and moved thereon. Timothy remained in sole possession of the premises in dispute from that time until his death,

and since his death such possession has been held by his widow. Plaintiff claims title by adverse possession, and also asserts that a deed was made therefor by William to Timothy, which has been lost. Both ¹⁹⁴ of these claims are denied, and defendant William Casey seeks to have title to the undivided one-half quieted in him. In the year 1867, Timothy and William Casey, with their wives, joined in making a mortgage on the land, and there is evidence from two sons of William Casey that Timothy admitted that William owned an interest therein. These declarations, it is said, were made in 1892 and later. There seems to have been nothing in the conversation, as it appears in the record, to have called them out. The facts just stated, together with the fact that the last deed in the chain of title, stands in the name of the two brothers as grantees, makes the case for defendants. On the other hand, the undisputed testimony shows that Timothy Casey held exclusive possession from the time his brother moved, in 1865. During that time he paid the taxes, received the rents and profits, and made various improvements upon the land. Among other of such improvements he built a dwelling-house. At different times he claimed sole ownership. Evidence of this fact was objected to, because the declarations were not shown to have been made in the presence of William Casey. But we think such evidence was admissible to prove, not the title, but the intent of the party in possession: *Youngs v. Cunningham*, 57 Mich. 153; *Lamoreaux v. Huntley*, 68 Wis. 24. Furthermore, to sustain plaintiff's claim it is shown without dispute that during all the years of Timothy Casey's occupancy of the land the defendant William lived only three miles distant, and that he was aware of many, if not all, of the improvements made upon the premises. There is no pretense of his ever exercising any act of ownership after 1865, other than his joining in the mortgage mentioned. On the contrary, we find that in the year 1893 a son of William, with the latter's knowledge and assent, leased a part of the land from Timothy and farmed it that year. These are the facts. Applying to them well-recognized principles of law, and we find that Timothy and his brother, the defendant, ¹⁹⁵ were tenants in common. Exclusive occupancy by one tenant in common, accompanied by acts or declarations of sole ownership, if known to his cotenant, will amount to an ouster: *Flock v. Wyatt*, 49 Iowa, 466; *Warfield v. Lindell*, 38 Mo. 561; 90 Am. Dec. 443; *Campau v. Dubois*, 39 Mich. 274; *Cummings v. Wyman*, 10 Mass.

464; Hubbard v. Wood, 1 Sneed, 279. And where there is an ouster, the possession of the occupying tenant may ripen into a title. Actual notice of the hostile acts and claim must be shown, but this may be done by circumstantial evidence, as in this case. In Laraway v. Larue, 63 Iowa, 408, the defendant was one of several tenants in common. He set up title by adverse possession founded upon facts quite similar to the facts in this case relied upon by plaintiff. This court held the possession to be adverse, and the title based thereon to be valid, and said upon the issue: "The deed to defendant was made in March, 1854, more than twenty years prior to the commencement of this action. The land was wild prairie. The defendant took possession at once, paid the back taxes, broke and fenced the land, and built a good common farmhouse, sixteen by twenty-four, and also barns, stables and cribs. He rented it for six years, and collected the rents. Afterward he moved upon it, and occupied it continuously as a homestead, and kept the taxes paid. . . . No one of the heirs claimed an interest in the land during this twenty years, nor claimed any rents or profits, though two of them lived near the land. . . . We cannot think for a moment that the defendant supposed he was a mere tenant in common, and held with half a dozen others, as the plaintiff contends that he did." So, in the case at bar, while the death of Timothy Casey renders it impossible to show what understanding or agreement he had with his brother when the latter removed from the land in 1865, yet we cannot think, in view of what subsequently transpired, that he supposed he was only a tenant in common with William. Knowles v. Brown, 69 Iowa, 11, is a case similar in principle to the one we have cited. A tenant in common was there ¹⁹⁶ awarded title, based upon adverse possession, against his cotenant. While we are unable, under the evidence, to reconcile the making of the joint mortgage by the two brothers after William had removed from the land with the claim of Timothy to sole ownership at that time, it must be remembered that the latter's death seals the lips of the only witness who could speak in plaintiff's behalf on this point. On the other had, it is impossible to make the conduct of these two brothers during Timothy's long occupancy accord with any other theory than that there was some conveyance or contract by which Timothy acquired William's interest in this land. To the claimed declarations of Timothy to the sons of William we are not inclined to allow any weight. The time and circum-

stances when they are said to have been made give an air of improbability to the occurrence, and the fact said to have been stated is contradicted by all the other facts and circumstances in evidence. We see no reason to interfere with the judgment of the district court. It is just, and has support in the evidence, and is therefore affirmed.

COTENANCY—ADVERSE POSSESSION BETWEEN COTENANTS—NOTICE.—The possession of one cotenant is presumed to be the possession of all, and, in order to rebut this presumption and make the possession adverse, it must be shown that the possession was with the intent to hold adversely, and such intent must be indicated by acts calculated to exclude the cotenant: *Bader v. Dyer*, 106 Iowa, 715, 68 Am. St. Rep. 332. There must be an actual ouster: *Mansfield v. McGinness*, 86 Me. 118, 41 Am. St. Rep. 532. Exclusive possession by a tenant in common who has taken a conveyance purporting to convey the property in severalty, does not constitute an ouster of his cotenants, and therefore cannot bar their right to partition, although he claims to own the whole of the tract, unless knowledge of such claim is brought home to them: *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. 169.

COTENANCY — ADVERSE POSSESSION — EVIDENCE. — The evidence necessary to prove ouster by one cotenant against another is much greater than in cases in which such relation does not exist between the parties: *Wheeler v. Taylor*, 32 Or. 421; 67 Am. St. Rep. 540, and note. As to the burden of proof in such cases, see *Stewart v. Stewart*, 83 Wis. 364, 35 Am. St. Rep. 67, and note.

WYMAN v. EATON.

[107 Iowa, 214]

RECEIVERS—FOREIGN—SUITS—BY.—The right of a receiver to bring suits in a foreign jurisdiction to enforce a liability arising under the law of the state of his appointment cannot be conferred upon him absolutely by his order of appointment, but can arise only through an exercise of comity between states, and such exercise will be denied where it would be in contravention of the rights of citizens and opposed to equity.

The defendants in this action were original subscribers for stock in the Iowa and Nebraska State Insurance Company. They paid fifty per cent of their several subscriptions, as required by the Nebraska statute under which the company was incorporated. They later surrendered their certificates, and new stock was issued to the parties purchasing from them. Accompanying these transfers of stock were substitutes for the promissory notes given by the defendants to secure the unpaid half of their subscriptions, of other notes given for the same purpose

by those persons to whom the defendants transferred their stock. These substitutions and transfers were made in good faith by all parties, and recorded in the books of the company while the latter was solvent. From the date of these transactions, which were completed prior to 1887, these defendants ceased to have any connection with or control over the corporation. The remaining facts appear from the opinion. Appeal from judgment in favor of the defendants.

E. & A. C. Wakley and Flickinger Brothers, for the appellant.

Harl & McCabe, Finley, Burke, Wright & Baldwin, Sanders & Stewart, John Y. Stone and C. R. Marks, for the appellees.

217 GRANGER, J. It will be well to repeat that this action is by a receiver appointed to wind up the affairs of the Nebraska Fire Insurance Company, on the application of one of its stockholders, to recover from the defendants on their subscriptions to the original enterprise, wherein was contemplated the organization of two companies—one in Nebraska, to be known as the Nebraska & Iowa Insurance Company, and one in Iowa, to be known as the Iowa & Nebraska Insurance Company, the two companies to be thereafter consolidated. The first-named company was organized under the laws of Nebraska and located at the city of Omaha, in that state, and the latter under the laws of Iowa, and located at the city of Council Bluffs, in Iowa. The consolidation was never made and the latter company was changed to that of the Western Home of Sioux City, and its place of business changed to Sioux City, Iowa, about May, 1885. The Nebraska & Iowa Company was changed to the Nebraska Fire Insurance Company, and continued to operate until 1891, when the insurance department of Nebraska withdrew its certificates authorizing the company to do business, and, on the application of one of its stockholders, its insolvency was decreed; and the plaintiff is now engaged in winding up its affairs, and this action is in aid of that purpose.

The action has for a legal basis a provision of the constitution of Nebraska, as follows (Neb. Const., art. 11, sec. 4): "Liabilities of Subscribers to Stock.—In all cases of claims against corporations and joint stock associations, the exact amount due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually **218** liable to the extent of their unpaid subscrip-

tions, and the liability for unpaid subscriptions shall follow the stock." Dismissing for the moment the effect of an arbitrary legal liability, which must be respected and enforced when known, there is not, in view of the entire record in this case, an equitable consideration favorable to a recovery against these defendants. The present liabilities of the Nebraska corporation cannot truthfully be said to have accrued in consequence of, or with reliance upon, the former connection of these defendants with the enterprise from which sprang the present company. These facts are important as aiding in the solution of a legal proposition urged by appellees, to the effect that this action cannot be maintained in Iowa because it is brought by a receiver of a Nebraska corporation to enforce a provision of the law of that state; the claim being that such a proceeding can only be had as a result of comity between the states, and that the basis of such an exercise is that the citizens of the state granting it shall not be thereby prejudiced or injured. Admitting, for the sake of argument, the rule that comity controls as to the authority of plaintiff to sue in this state, and, as we have in effect said, the record leaves us without doubt that its exercise should be denied, because it would be in contravention of the rights of our citizens, and operate to their injury.

Upon the question of the absolute right of plaintiff to sue in this state, we are not without precedent in our own decisions; and while, in announcing a rule, we have recognized the fact of a conflict of authority, we are not persuaded by the argument in this case that a change should be made, or the rule modified. Stress is given in argument to the fact that the order of appointment in Nebraska gives to the receiver authority to bring suits in other states. That authority is valuable as an aid to secure the right to do so in the state where the privilege is sought, and is judiciously granted; but it is without efficiency to create such a right independent of sanction ²¹⁹ within the state. The case of *Booth v. Clark*, 17 How. 322, contains a somewhat exhaustive consideration of the question of the right of a receiver appointed in one state to bring a suit for the possession of property in another state, and it is there said: "He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the

judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." An underlying thought of the rule seems to be that, within the jurisdiction of one's appointment as receiver, he is amenable in his official capacity to the courts, and he may exercise his authority under the law of the jurisdiction; while, in a foreign jurisdiction, the law does no more than to make the person entering it amenable to its laws, and in no way recognizes the official capacity. As a citizen in a jurisdiction foreign to his residence, he has a legal status, and is amenable to, and may invoke the protection of, the law. As an officer of a court from a foreign jurisdiction, he has, and is entitled to, no legal recognition, except as the courts may, in their discretion, grant it, because he is without the official obligation that he assumed in his own jurisdiction, and which is essential to a proper and safe exercise of such power. In *Ayres v. Siebel*, 82 Iowa, 347, we denied the right of a trustee, appointed by the court in Indiana, to sue and recover on a contract in this state; and in *Parker v. Lamb*, 99 Iowa, 265, we denied such a right to receiver, and cited the *Ayres-Siebel* case. In *Parker v. Lamb*, 99 Iowa, 265, we quoted approvingly from *High on Receivers*, section 289, as follows: "Upon the question of the territorial extent of a receiver's jurisdiction and power for the purpose of instituting actions connected with his receivership, the prevailing doctrine established by the supreme court of the United States, and sustained by the weight of authority in various ²²⁰ states, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot go into a foreign state or jurisdiction, and there institute a suit for the recovery of demands due the person or estate subject to his receivership. His functions and powers, for the purpose of litigation, are held to be limited to the courts of the state in which he was appointed; and the principles of comity between states and nations which recognize the judicial decisions of one tribunal as conclusive on another do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." These authorities are broad and conclusive, and, unless we are to set them aside, are conclusive of this case. Counsel have shown great zeal and tact in presenting authorities more or less in point, and we acknowledge somewhat of a conflict, as we have done in other cases; but the weight of authority we regard as in line with our holdings, and we are not disposed to disturb them. Beach on

Receivers, section 680, states the same rule, and cites *Booth v. Clark*, 17 How. 332, from which we have quoted, and then says: "The rule thus laid down by the supreme court of the United States has been followed by other courts with essential unanimity, and can hardly be said to be seriously questioned." In *Fitzgerald v. Fitzgerald etc. Construction Co.*, 41 Neb. 374, these authorities are approvingly cited and applied. It remains for us to state as a conclusion that the plaintiff is not entitled to recover in the courts of Iowa, and the judgment of the district court will be affirmed.

RECEIVERS—FOREIGN—SUITS BY.—A receiver appointed in another state for an insolvent corporation may, in this state, maintain an action in its name upon a liability due it. Through comity between states a representative of a court of one state will be permitted to sue in the courts of the other when the suit does not injuriously affect the interests of the citizens of the latter nor violate its policy or laws: *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363, and note. See the extended note to *Straughan v. Hallwood*, 8 Am. St. Rep. 49; also the note to *Alley v. Caspari*, 6 Am. St. Rep. 185.

IOWA SAVINGS & LOAN ASSOCIATION v. HEIDT.

[107 IOWA, 297.]

BUILDING AND LOAN ASSOCIATIONS — LOANS TO MEMBERS—PROPER DEDUCTIONS.—A building and loan association may retain from loans made to members a sum sufficient to cover the cost of examining abstract, appraiser's fee, recording mortgage, and expenses of management.

BUILDING AND LOAN ASSOCIATIONS—USURY—EXACTION OF PREMIUMS.—A building and loan association authorized by statute to receive "premiums bid by members for the right of precedence in taking loans," has no authority to exact from the borrower, where there is no competition, an arbitrary sum in addition to the interest on his loan, where the whole amounts to more than legal interest.

BUILDING AND LOAN ASSOCIATIONS—USURY—INTEREST UPON FACE, RATHER THAN AMOUNT, OF LOAN.—A building and loan association, having deducted from a loan to a member a sum sufficient to pay expenses incidental to making the loan, which are properly charged to the borrower, may compute legal interest upon the face of the loan instead of the amount actually received by the borrower without making the transaction usurious.

BUILDING AND LOAN ASSOCIATIONS—EXORBITANT FINES.—One who purchases stock in a building and loan association is held to a knowledge of the terms of his membership, and will not be heard later to complain of the imposition of reasonable fines for defaults in payments, which fines are authorized by statute.

BUILDING AND LOAN ASSOCIATIONS—USURY—CONSTITUTIONAL LAW.—The legislature may exempt transactions between building and loan associations and their members from the operation of the law against usury.

USURY—STATUTORY CHANGES—RETROACTIVE EFFECT.—The privilege of pleading usury pertains only to the remedy and may be taken away by statute as to contracts entered into before the enactment of the statute, nor does such a statute impair vested rights when enacted pending an appeal from a decree in favor of a member of a building and loan association on a plea of usury, made to avoid the enforcement of a contract between himself and the association.

BUILDING AND LOAN ASSOCIATIONS—AMOUNT RECOVERABLE FROM MEMBERS—STATUTORY CONSTRUCTION.—A statute fixing the amounts that may be included in the recovery by a building and loan association from a borrower should be construed as fixing the maximum amount of recovery, and not as preventing the association from contracting to receive a less amount.

Action in equity to foreclose a mortgage on real estate and to cancel certain shares of stock held by the defendant in plaintiff association. The defense of usury was sustained by the trial court. An accounting was had. A judgment of forfeiture was given in favor of the school fund. The appeal is from a decree in favor of the plaintiff for seventy-two dollars and eighty cents without either interest or costs.

Bailey & Ballreich, for the appellant.

Dudley, Coffin & Byers, for the appellee.

208 WATERMAN, J. Plaintiff is a building and loan association, having incorporated as such originally in 1889. On July 2, 1896, its articles were amended to comply with the requirements of chapter 85 of the acts of the twenty-sixth general assembly. Defendant was the owner of ten shares of stock in said association, and on February 15, 1891, he borrowed from it the sum of one thousand dollars, giving as security his shares of stock in pledge and the mortgage in suit. At the time of **290** making the loan, plaintiff deducted from the amount of the loan the following sums: Attorney's fee for examining abstract, two dollars and fifty cents; appraiser's fee, two dollars; recording mortgage, one dollar; abstractor's fee, nine dollars. The remainder, nine hundred and eighty-five dollars and fifty cents, was paid to defendant. Defendant was to pay, according to the contract contained in his note and mortgage, the sum of seventeen dollars per month until the maturity of his stock. This

amount was made up as follows: sixty cents per share, installments on his stock, six dollars; sixty cents per share, premium for the loan, six dollars; and fifty cents per share as interest on the money received, five dollars. Out of the dues on stock, the association deducted seven cents from each sixty cents paid for expenses of management, but only so much of this was used or kept as was necessary for actual expenses. From time to time the surplus of the expense fund was carried to the credit of the stockholders.

1. It is claimed that defendant did not receive the full amount of his loan, and this is correct. But the amounts deducted were necessary expenses in perfecting the loan. These sums were not retained by the association, but were paid to others, and were proper charges against defendant: *Hawkeye State etc. Assn. v. Johnston*, 106 Iowa, 218.

Some complaint is also made because of the deduction by the association of seven cents out of each sixty cents of dues, for expense of management. We see no ground for a member's objection to this method. It is not claimed that more was used for expenses than was actually necessary. Now, it is apparent that these expenses had to be paid by the members. If a fund was not raised in this way, the amount would have to be taken from the earnings. In any event the burden would fall on the stockholders.

2. With these minor matters out of the way, we take up the next question in the case, which is the claim of usury. It is said: 1. That the contract is usurious, because the premium exacted was not bid for the right of precedence in ³⁰⁰ taking the loan; 2. Because interest was charged upon the face of the loan; and 3. Because the fines and fees were exorbitant. It is true that the premium was a fixed sum, established by the by-laws of the association, and chapter 6, title 9, of the Code of 1873, was in force when this loan was made. In that chapter such associations are given the right to receive "premiums bid by members for the right of precedence in taking loans," and then it is said the taking of such premiums shall not be held to be usury. We are of the opinion that, under the statute, it was not lawful for the association to exact from a borrower, where there was no competition, an arbitrary sum in addition to the interest on his loan, where the whole amounted to more than legal interest; and we may say, without setting out the computation, that we think it did in this case. In *Burlington etc. Assn. v.*

Heider, 55 Iowa, 424, and Hawkeye etc. Assn. v. Blackburn, 48 Iowa, 385, each of which involved a construction of the statute we are now considering, while usury was pleaded, the question presented now was not raised. Except in name, the premium here does not differ in any way from interest. It is paid for the use of money, and not for the privilege of getting the loan. As it is claimed that the acts of plaintiff in exacting from defendant the various sums it did as consideration for the loan were validated by subsequent legislation, it may be well for us to determine to just what extent curative acts were needed. We take up, therefore, defendant's further claims of usury.

3. It is said that the loan was usurious, because interest was charged on the face of the note, and not on the amount actually paid to defendant. The two cases last cited are thought by counsel for appellee to support this claim. In those cases the premium charged for the loan was deducted at the time the loan was made, and was retained by the association for its benefit, and interest was collected upon the whole sum, including the amount of the premium; and this interest exceeded the rate fixed by law. The items which defendant claims should not have been included in the principal in the ³⁰¹ case at bar, and upon which interest was computed, are the two dollars and fifty cents for examining abstract and two dollars appraisement fee. Both of these were legitimate matters of expense, as we have already said. As we understand the record, while the two dollars fee was paid into the expense fund, it was the exact amount that was paid by the association out of that fund for the appraisement in the making of this loan; and the other fee was paid to an attorney for services actually rendered. The payment by the borrower of the necessary expenses of the lender, incurred in making the loan, in addition to the legal interest, will not constitute usury: *Smith v. Wolf*, 55 Iowa, 555. These amounts were not exacted as a bonus by the association, and it got no benefit whatever from their payment. This case is materially different from those upon which defendant relies.

4. Next, it is said that the fines charged were exorbitant. Doubtless, a fine may be so unreasonable and excessive as to be void. But these do not appear to be that of character. Impositions proportionately as heavy have been approved in similar cases: See 4 Am. & Eng. Ency. of Law, 1042, note 4. The statute authorized these penalties, and it fixed no limit to the

amount that might be imposed. The amount fixed by the by-laws of the association was five cents for the first default on each share, and ten cents for each subsequent default. This amount was not exceeded in defendant's case. He knew, or should have known, the terms of his membership when he purchased stock in the association, and we do not think he can be heard now to complain of an obligation which he voluntarily assumed.

5. As we have found that the contract was tainted with usury because of the exaction of the level or arbitrary premium, it now becomes necessary to determine whether it had been purged of this illegality by subsequent legislation. This loan was made in 1891. In 1896 the twenty-sixth general assembly passed an act (chapter 85) providing for the government, management, and operation of associations of ³⁰² this character. Section 9 of that act, so far as material, is as follows: "All building and loan and savings and loan associations upon receiving the certificate of the auditor shall have power to assess and collect from members such dues, membership fees, fines, premiums and interest on loans as may in the articles of incorporation and by-laws have been provided, and the same shall not be held to be usurious to make loans to members on such terms and conditions as the articles of incorporation and by-laws provide. . . . In case of foreclosure, the borrower shall be charged with the full amount of the loan made to him, together with dues, interest, premium, and fines for which he is delinquent, and he shall be credited with the same value of his pledged shares as if he had voluntarily withdrawn the same." It is claimed by plaintiff that this section applied to contracts made prior to its passage, and validated acts already done. This law is not expressly made retroactive, and we should hesitate before giving it that effect, especially to the extent claimed by plaintiff. But in view of our holding upon another statute, which is set up, and which we shall next consider, it is not necessary that we decide this question.

6. Section 9, which we have set out, with some changes not material to be noticed here, went into the present Code as section 1898. The twenty-seventh general assembly, by chapter 48, amended this section, as follows: "The provisions of said section shall apply to and govern all contracts between building and loan and savings and loan associations and their members, made and entered into prior to the taking effect of the

code, and every such contract shall in all actions and proceedings be construed and enforced as in said section provided, and with the same force and effect, as if made and entered into after the code took effect, anything in the statutes in force when such contracts were made to the contrary notwithstanding." We think this act was intended to make valid and enforceable all previous contracts for loans, which were within the terms of section 1898, as the contract in suit clearly was.

303 The next question is as to the legislative power to do this. As a general rule, it may be said the legislature can validate any act which it might originally have authorized. *Windsor v. Des Moines*, 101 Iowa, 343; *Clinton v. Walliker*, 98 Iowa, 655. A number of objections are made to the application of this rule to the case at bar. First, it is said that the building and loan law of the state is unconstitutional, because it is class legislation. Some of the arguments advanced in support of this claim assail rather the policy of such statutes than the power to enact them. In theory, these institutions are profit-sharing. The amounts directly paid for the use of money go indirectly to the benefit of the stockholders, through the increase in the value of their shares. Where the loans are confined to shareholders, we can see good reason for exempting such associations from the operation of the usury law. That the constitutional power exists to make this exemption, we think, is without serious doubt: *People's Bldg. etc. Assn. v. Billing*, 104 Mich. 186; *Vermont etc. Trust Co. v. Whithed*, 2 N. Dak. 82; *Archer v. Baltimore etc. Assn.* (W. Va. April, 1898), 30 S. E. Rep. 241. See also, on the general character of these institutions, and the reasons for special legislation in their favor, *Hawkins v. American etc. Assn.*, 96 Ga. 206; *Granite State etc. Assn. v. Monk* (N. J. Ch. Jan. 3, 1895), 30 Atl. Rep. 872; *Natchez etc. Assn. v. Shields*, 71 Miss. 630. Next, it is said the curative act is invalid, so far as this case is concerned, for to give it effect as against defendant would impair vested rights. The act in question was passed after the decree was rendered by the trial court in this case; and for this reason it is thought that defendant's rights had so accrued and vested as that they could not be disturbed or altered such legislation. In *Clinton v. Walliker*, 98 Iowa, 655, the curative act was given application to a contract involved in a suit which was pending when the act was passed. The same holding was made in *Tuttle v. Polk*, 84 Iowa, 12. *Richman v. Supervisors*, 77 Iowa, 513, 14 Am. St. Rep. 308,

304 was a certiorari proceeding to test the validity of an assessment and levy of a tax for building a levee. In a former proceeding, the action of the board of supervisors had been set aside, and the assessment declared void, by the circuit court, and this holding was affirmed by this court. After this final judgment, the general assembly passed an act authorizing a new assessment. This was had, and proceedings were again instituted to test the validity of the tax levied under the curative act. This last is the case we have cited. It was urged by the petitioners that they had vested rights under the first decision, but the claim was denied by this court. In *Huff v. Cook*, 44 Iowa, 639, defendant, a woman, claimed to have been elected to the office of county superintendent. In a proceeding to test her right to the office, the trial court held that she was ineligible because of her sex. She appealed. After the judgment below, an act was passed by the general assembly, which in effect declared that no person previously elected to such office should be disqualified from holding the same because of her sex. It was held by this court that the bringing of an action vests no right to a particular decision, and that defendant being eligible when final judgment was pronounced it should go in her favor. See, also, *Iowa etc. Land Co. v. Soper*, 39 Iowa, 112, 124. It is difficult to perceive what right of the plaintiff in the case at bar was disturbed by the curative act other than a mere privilege of pleading usury; and this pertains only to the remedy, which, it is uniformly held, may be altered at the legislative will: *Kossuth County v. Wallace*, 60 Iowa, 508; *State v. Squires*, 26 Iowa, 340. So far as the payments made and fines imposed are concerned, they were in accord with the terms of defendant's contract. The effect of the subsequent legislation was not to change the agreement, but only to remove a bar to its enforcement. The cause being triable *de novo* in this court, there seems no legal objection to the entering of a decree in conformity with the law as it now exists.

305 7. It is further urged against the validity of the subsequent legislation that it allows a recovery which may be greater than the amount fixed by the contract in some cases; and it is said that, in the case at bar, plaintiff could recover more under the law than it could lawfully claim on its contract. But, so far as plaintiff is concerned, it is seeking nothing more than its contract calls for. Furthermore, we do not think the measure of recovery specified in the law is meant to be mandatory, in the

sense that the parties may not make a contract more favorable to the debtor by which they will be bound. The law fixes the maximum of recovery against a debtor, and we can see no reason why, within the limit specified, an agreement for a different settlement may not be made.

8. Plaintiff is entitled to a judgment for the sum of five hundred and seventy-one dollars and eighty cents, with interest at eight per cent from November 1, 1895, the date of defendant's default. We find this amount by adding the dividends to the dues and premiums paid, which makes a total of four hundred and twenty-eight dollars and twenty cents, and deducting this from the face value of the note. We have made no deduction from defendant's credits for expenses, because we are unable to determine what the actual expenses were. The amount plaintiff withheld from premiums for this purpose is given; but it appears that this was often too liberal an allowance, and left a balance to be carried to the loan fund. Plaintiff is entitled to charge defendant only for his share of the actual and necessary expense of management, and, as is said, we cannot determine what this would be. It is manifest from what has been said that the judgment in favor of the school fund is erroneous. Under the circumstances, we think an apportionment of the costs should be made. Following the rule applied in *Iowa etc. Land Co. v. Soper*, 39 Iowa, 112, the costs both of the court below and of this court will be equally divided between the parties. Modified as we have suggested, the decree against defendant will be affirmed.

BUILDING AND LOAN ASSOCIATIONS—USURY.—In some parts of the United States are statutes authorizing the formation of such associations and the loaning of their moneys upon premiums paid by their members, and where such is the case the corporate mode of doing business is necessarily legalized and exempted from the penalties of usury. Partly from the influence of special statutes and partly because the courts have not regarded transactions of this class as mere loans of money, but as being part of a general business scheme in which the borrower participates in the profits and obtains advantages in addition to the mere loan of money to him, the majority of the decisions in this country sustain the transactions in question, and declare that they do not offend against the statutes upon the subject of usury: See the extended note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 200; *Pollock v. Carolina etc. Assn.*, 51 S. C. 420, 64 Am. St. Rep. 683. Contra, see *Meroney v. Atlantic etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, and note. See the monographic note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 150-166.

BUILDING AND LOAN ASSOCIATIONS—USURY—EXACTION OF PREMIUMS.—A premium, to be legal, must be one that is bid for a right of precedence in taking a loan at a competitive sale, and, when there is no such sale and no bid, there can be no legal premium: *McCauley v. Building etc. Assn.*, 97 Tenn. 421, 56 Am. St. Rep. 813.

BUILDING AND LOAN ASSOCIATIONS—FINES.—Fines for nonpayment of dues are essential to the exercise of the express powers conferred upon building and loan associations in their incorporation, and they have a right to impose them whether any express warrant is found for it in the statute of incorporation or not. They have such power by implication, but when not fixed by statute, such fines must be prescribed by the charter or by-laws of the association in precise and unequivocal terms, so as to be readily understood by members, and they must be reasonable, or they cannot be enforced: *Roberts v. American etc. Assn.*, 62 Ark. 572, 54 Am. St. Rep. 309, and note.

McPEEK v. WESTERN UNION TELEGRAPH CO.

[107 IOWA, 356.]

REWARDS—EVIDENCE TO PROVE OFFER—COPY OF GOVERNOR'S PROCLAMATION.—To prove the offer of a reward for the arrest of a person, a copy of the governor's proclamation, duly certified by the secretary of state, with whom the original is deposited, is admissible in evidence.

TELEGRAPH COMPANIES—NOTICE OF IMPORTANCE OF MESSAGE.—In an action for damages occasioned by the delay of a telegraph company in delivering a message, extrinsic evidence is admissible to show that the company had notice of the importance of the message.

TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY OF MESSAGE.—The liability of a telegraph company to the sendee of a message for damages resulting from a delay in delivery is not one arising from contract, but is based upon its negligence in the performance of a duty in its public capacity as a common carrier of messages.

TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—MEASURE OF DAMAGES.—A person injured by the delay of a telegraph company in delivering a message to him is not limited in his recovery to such damages as might reasonably have been within the contemplation of the parties, but recovery may be had for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force.

TELEGRAPH COMPANIES—DAMAGES FOR DELAY IN DELIVERY OF MESSAGE—LOSS OF REWARD.—Where a person has laid a plan for the capture of a fugitive from justice with a view to obtaining the reward offered therefor, and has notified a telegraph agent that he is expecting a telegram of great importance to the success of his plan, and the agent knows that prompt delivery of such message will be necessary, the telegraph company will be liable in damages to the amount of such reward if the agent's

delay in delivery of the message frustrates the sendee's plan. It is not necessary that the agent have actual notice of the offer of the reward, he being charged with knowledge that such offer might be made.

TELEGRAPH COMPANIES—NEGLIGENCE IN DELIVERY OF MESSAGE—BURDEN OF PROOF.—In an action against a telegraph company for the loss of a reward offered for the capture of a fugitive from justice, which loss is alleged to have resulted from the negligence of the defendant in delivering a certain telegram, the burden of proof rests upon the plaintiff, and the question whether or not such loss resulted from the negligence alleged is for the jury.

TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY OF MESSAGE—OFFICE HOURS.—An agent of a telegraph company undertaking to deliver a message outside of office hours is acting within the scope of his agency, and the company is liable for his failure to exercise reasonable diligence. Whether or not such diligence was exercised is a question for the jury.

Blake & Blake, for the appellant.

John D. Dill and W. I. Babb, for the appellee.

359 LADD, J. September 20, 1896, after mortally wounding John Finley, the marshal of Morning Sun, Orman McPherson fled. A few days after the plaintiff saw McPherson's wife, who promised to assist him in procuring the arrest of her husband. McPeek obtained McPherson's pension papers from Keithsburg, Illinois, for her and she advised him (being in secret correspondence under an assumed name) of having these, and he came to her room at the hotel at Morning Sun, where she was employed as cook, October 22, 1896, at about 10 o'clock P. M. (having so arranged earlier in the evening), and there remained until between 3 and 4 o'clock the following morning. Before coming in, he gave up his revolvers, and she placed them in a bureau where they remained during his stay. She had agreed to write to McPeek when she expected her husband, but, if he came unexpectedly, then to telegraph him. At about 7 o'clock P. M. of the twenty-second, she delivered to the defendant's agent at Morning Sun this telegram: "E. E. McPeek, Winfield. Come on first train. Answer. M. E. M."—telling him she wanted it "sent right away and delivered, and wanted an answer." Ridgway, the agent at Winfield, usually closed his office at 6 o'clock, but was ordinarily at the station at about 9 o'clock. He received the message at 9:15 o'clock P. M., and carried it to the plaintiff's house, reaching there at about 9:30. After repeatedly rapping at the door, and being unable to arouse

anyone, as he says, he placed the message over the door knob, with the end of the envelope between the door and the jamb, where it was found the next day at between 9 and 10 o'clock A. M. It seems the agent supposed the family was away from home, and would find it upon their return. They had in fact retired, and all testify that they did not hear the rapping of Ridgeway, or any noise at the door, and that they would have heard it had there been any. The only train carrying passengers leaving Winfield for Morning Sun, a distance of about twelve miles, left the former place ³⁰⁰ at 6 o'clock A. M. McPeek had told Ridgeway he was making an effort to capture McPherson, and might get a telegram from Morning Sun concerning the matter, and that if a message came, and he was unable to find him, to deliver it to Siberts, a constable. Both had repeatedly called at the office for such a telegram. It also appears that Siberts, by direction of McPeek, had arranged for a team at the livery stable and a driver to be ready for him at any time, and that Siberts was to go with McPeek in case McPherson should come to Morning Sun. The constable at the latter place, and another, had agreed to assist him, though not advised as to the nature of the business except that it was to make an arrest. The evidence was such that the jury was warranted in finding the facts as stated, though it must be added that Ridgeway denies having previously talked with either the plaintiff or Siberts; and McPherson, who was afterward arrested, declared he was not at Morning Sun as testified by his wife, and did not correspond with her. On the twenty-first day of October, 1896, the governor of Iowa, by proclamation, offered a reward of three hundred dollars for the arrest of McPherson, and his delivery to the proper authorities. The plaintiff's action is based on the allegation that he lost this reward through the negligence of the defendant in not delivering the message on the evening of October 22d. With these preliminary statements we shall be able to consider the different questions presented by the record.

1. A copy of the governor's proclamation, duly certified by the secretary of state, was received in evidence over the objection of defendant. That such a reward was authorized by section 58 of the code of 1873 is not questioned. The method of making the offer is not pointed out, but it is to be paid upon the certificate of the governor. Usage has approved offering such rewards by way of proclamations, and this fully complies with

the statute. That the original proclamations made by the executive of a state should be preserved admits of no doubt. The statute makes no express provision ³⁶¹ for such preservation, but by section 66 the secretary of state "shall have charge of and keep . . . papers which are now or may be hereafter deposited to be kept in his office." The secretary certified that he was the custodian of the record of the official acts of the executive department, and that the proclamation was a part of the files of his office. We take it, then, that this was deposited, to be kept by the secretary of state. Section 4649 provides, in substance, that acts of the executive of this state are proved by the records of the state department. The very evident purpose is to avoid the necessity of calling the governor before a co-ordinate branch of government to give evidence or answer for any of his acts. While the statute does not in express terms make such papers a part of the files to be kept and preserved by the secretary of state, we are of opinion that section 66 is broad enough to include them, that by fair implication section 4649 authorizes them to be so kept, and that, under sections 4649 and 4635 of the code, a certified copy thereof is admissible in evidence in lieu of the originals.

3. The defendant also interposed objections to the testimony of the plaintiff, Siberts, and Mrs. McPherson to the arrangement made between them with reference to the capture of McPherson. This was original, and not hearsay, evidence. It related to circumstances and facts essential to be proven as leading up to the sending of the telegram and had a direct bearing upon the probability of the plaintiff effecting the arrest of McPherson, had the telegram been properly delivered. It was necessary to show the exact situation, and all that had been done to accomplish that purpose. The appellant is impressed by the danger of fraud in this class of evidence. It is suggested that, if there be possibility of fraud, it may readily be obviated by the exercise of diligence.

3. It is insisted that the damages were remote, and not such as either party might have contemplated from the ³⁶² wording of the message. But extrinsic evidence was admissible to show that defendant had notice of the importance of the message: *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 835. The appellant argues the case on the theory that the action of plaintiff is for the breach of contract. He made no

contract with the defendant. This is conceded by appellant in its opening argument, and denied in its reply. The first impression was undoubtedly the correct one. The contract was with the sender of the message, and whether recovery might be had for breach thereof, because made for plaintiff's benefit, we need not determine. This action is based on the negligence of the defendant in the performance of a duty in its public capacity as a common carrier of messages. In all such actions, sounding in tort, the injured party is not limited to damages which might reasonably have been within the contemplation of the parties, but recovery may be had "for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force": *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 757, 57 Am. St. Rep. 294; Code, sec. 2163; *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248, 15 Am. St. Rep. 109; *Western Union Tel. Co. v. Allen*, 66 Miss. 549; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403; *Young v. Western Union Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920. There was evidence tending to show that immediate delivery was requested, and that the agent at Winfield knew that McPeek was expecting a message, that it would relate to the capture of McPherson, and that prompt delivery was required. If so, while he may not have known of the reward being offered he may well be credited with understanding that McPeek was putting forth his efforts to accomplish a ³⁶³ purpose from which he anticipated some benefit to accrue to himself. The law authorizes the offering of such rewards, and it is not too strict a rule to hold the defendant responsible for such losses as may reasonably be anticipated to follow its negligence, whether informed definitely what these may be or not. It was charged with knowledge that such a reward might be made, and it might reasonably reckon on such a contingency, in omitting its duty with reference to such a message. Nor was the plaintiff advised that the reward had actually been offered on October 22d, though he understood it would be, and was acting to secure this and others proposed by local officers. That the omission of the defendant caused greater loss than he then supposed does not affect its liability, or his right of recovery. Certainly,

the loss of the reward was the direct result of the failure to arrest and deliver McPherson to the proper authorities, for this was the very condition of its payment.

4. The burden was on the plaintiff to prove that in all reasonable probability the loss resulted from the negligence of the defendant: *Hendershott v. Western Union Tel. Co.*, 106 Iowa, 529, 68 Am. St. Rep. 313. Had the plaintiff proceeded by team to Morning Sun, with the assistance of the two constables and another, there seems no good reason to doubt that he would have arrested McPherson, who had been disarmed by his wife. This is not absolutely certain, for many contingencies may be supposed which could have intervened. While these might well be considered, they do not warrant us in saying that these men would not have accomplished that which has often been done before, and which is ordinarily done by officers in like situation. Whether they would in all probability have succeeded was for the jury to determine.

5. It is suggested that, as the train did not go until 6:06 in the morning, even if the message had been delivered the plaintiff could not have reached Morning Sun in time to make the arrest. But the plaintiff had made every arrangement to go by team. This message was understood ³⁶⁴ by the plaintiff to require immediate attention owing to his agreement with Mrs. McPherson.

6. It may be that the defendant can fix office hours which are reasonable, and that those from 8 A. M. to 6 o'clock P. M. are not unreasonable. This we do not decide. But see *Western Union Tel. Co. v. Harding*, 103 Ind. 505; *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119. The company received this message, if Mrs. McPherson is to be believed, with the understanding that it was to be delivered at about 9 o'clock. The agent at Winfield received it, and the company, having undertaken to deliver it, was bound to do so with reasonable diligence: *Thompson on Electricity*, sec. 300. He was acting within the scope of his agency, although not within the hours fixed for the active discharge of his duties. This could not relieve the company from discharging the obligation incurred by receiving the message to be delivered out of office hours.

7. The defendant asserts that no negligence in failing to deliver the message has been shown. If the testimony of Ridgeway be accepted as true, it might be that, in loudly rapping on the door repeatedly, and receiving no response, he exercised reasona-

ble diligence. This is in dispute. The daughter of the plaintiff testified that she was at his home from 9 o'clock P.M., and did not retire until a half-hour later, and that she heard no noise at the door. Mr. and Mrs. McPeek also testified that they heard no such noise, and that they would have been likely to have heard it, had there been any. Whether Ridgeway made any effort to arouse the family is put in question by this evidence. If he was advised of the importance of the message, as claimed by the plaintiff, he was bound to exercise diligence accordingly, and whether he so did was for the determination of the jury.

Some other matters are discussed, but they are not of sufficient importance to call for special attention. We discover no error in the record, and the judgment must be affirmed.

TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—LIABILITY TO SENDEE.—No relation of contract exists between the receiver of a dispatch and the telegraph company, and the proper remedy of the former for damages is an action in tort: *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 61 Am. St. Rep. 207; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109.

TELEGRAPH COMPANIES—DELAY IN DELIVERY—DAMAGES.—It is as much the duty of a telegraph company to use diligence in delivering messages without unreasonable delay as in transmitting them, and it is generally liable in special damages for such delay or for the nondelivery of a message: *Western Union Tel. Co. v. Moore*, 12 Ind. App. 136, 54 Am. St. Rep. 515, and note. A telegraph company is liable for such damage as is the direct and natural result of its failure to deliver a message: *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843. The general rule is, that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation: See the extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778. The loss of a mere opportunity or possibility to make some money does not render a telegraph company liable in damages for the nondelivery of a telegram: *Clay v. Western Union Tel. Co.*, 81 Ga. 285, 12 Am. St. Rep. 316.

TELEGRAPH COMPANIES—NOTICE OF IMPORTANCE OF MESSAGE.—To authorize a recovery of special damages for delay in the delivery of a message, the telegraph company must have had notice, either from the face of the message or otherwise, at the time of receiving it, of the circumstances out of which special damages might arise: *Gulf etc. Ry. Co. v. Loonie*, 82 Tex. 323, 27 Am. St. Rep. 891, and note. Contra, *Western Union Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222, and note.

TELEGRAPH COMPANIES—DELIVERY OF MESSAGE—BURDEN OF PROOF.—A prima facie case is made out against a telegraph company when it is shown that the message which the company undertook to send was not delivered, and that damage has resulted, and the burden of proof is then thrown upon the company to show the exercise of ordinary care, and that its failure to transmit and deliver the message was not caused by its fault or negligence, or that of its employes: *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211.

FEDER v. IOWA STATE TRAVELING MEN'S ASSOCIATION.

[107 Iowa, 538.]

INSURANCE — ACCIDENT — WHAT IS.—While it may be true that an accident is an event which takes place without one's foresight or expectation, and is undesigned, it is not true that every unforeseen, undesigned, and unexpected event is an accident. A result which, though not designed, foreseen, or expected, is yet the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, cannot be said to be accidental.

INSURANCE — ACCIDENT — DEATH BY—RUPTURE OF ARTERY.—Where the death of an insured was due to the rupture of an artery it will not be considered as the result of accident where, in the circumstances attending the rupture, there is no evidence that anything was done or occurred which the insured had not foreseen or planned, except the rupture and its consequences.

Berryhill & Henry and George E. Hubbell, for the appellants.

Cummins, Hewitt & Wright, for the appellee.

538 ROBINSON, C. J. The certificate in suit was issued to one Louis L. Feder, and entitled him to all the benefits accruing from membership in the defendant by virtue of its constitution and by-laws. When the certificate was issued, an article of the constitution of the defendant provided that "whenever the death of a member of this association in good standing shall occur from any accidental cause (except while such member shall be under the influence of intoxicating liquors or narcotics)," and proofs thereof should be made, the **539** proceeds of an assessment of two dollars on each member of the association, not exceeding the sum of five thousand dollars, should be paid to the beneficiary named in the certificate, or to his heirs or legal representatives, provided, however, that if, at the time of such death, the amount of money in the treasury of the association not otherwise appropriated should exceed the sum of five thousand five hundred dollars, payment of five thousand dollars was to be made from the money in the treasury. On the eighteenth day of April, 1894, Feder died. At that time he was a member of the association in good standing, and this action is brought on the certificate, to recover the sum of five thousand dollars. The validity of the certificate is admitted, the death of Feder is not disputed, and notice and proofs of his death are shown. We are required to determine whether there was sufficient evidence tending to show that Feder's death re-

sulted "from an accidental cause" to require the submission of the case to the jury.

The evidence tended to establish the following: The decedent, at the time of his death, was about twenty-six years of age, and had been in Denver, where his death occurred, about nine months. He was suffering from consumption, and went to Denver and resided there, on account of his health. He was benefited by the change of climate and medical treatment he received, and his health had been considerably improved, and was constantly improving, at the time of his death. During the day of his death he had been as well as usual, and in the evening was with two of his brothers in their office. Preparatory to leaving it, the decedent went to a window to close the shutters. A chair stood in front of the window, and he stood on his toes, and reached over the chair toward the shutters, and, as he did so, blood began to flow from his mouth. He was placed on a lounge, and died within a few minutes. The cause of his death was hemorrhage from a ruptured artery, and the evidence would have authorized the conclusion that the rupture ⁵⁴⁰ of the artery was not due to the disease from which he was suffering. There is no evidence that he fell, slipped, lost his balance, failed to catch the shutter when he reached for it, or that it moved at his touch more or less readily than he had expected it would move; in other words, there is no evidence whatever that anything was done or occurred which he had not foreseen and planned, excepting the rupture of the artery, and the consequences which resulted from it.

Did his death result "from an accidental cause"? Various definitions of the word "accident" are quoted by the appellants, and among them are the following: It is an "unexpected event, which happens as by chance, or which does not take place according to the usual course of things": *North American etc. Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212. "The equitable definition of the term 'accident' includes, not only inevitable casualties, and such as are caused by the act of God, but also those which arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons, without fault, negligence, or misconduct on the part of the person injured": *Bostwick v. Stiles*, 35 Conn. 198. "An event which takes place without one's foresight or expectation"; and it may include an injury received in a common-law affray, without the fault of the person injured: *Supreme Council etc. v. Garrigus*, 104 Ind.

133, 54 Am. Rep. 298. "An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected"; *Schneider v. Provident etc. Ins. Co.*, 24 Wis. 30, 1 Am. Rep. 157. "An accident is the happening of an event without the aid and the design of the person, and which is unforeseen": *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758. "An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event": *Webster's International Dictionary*. See, also, *Fidelity etc. Co. v. Johnson*, 72 Miss. 333; *Carnes v. Iowa etc. Ass.*, 106 Iowa, 281, 68 Am. St. Rep. 306. The ordinary ⁵⁴¹ and popular meaning of the word "accidental" is said to be "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected": *United States etc. Assn. v. Barry*, 131 U. S. 100.

It is argued that the rupture of a blood vessel is not the usual result of an effort to close shutters; therefore, when it occurs, it is unusual, unexpected, and an accident. While it may be true that an accident is an event which takes place without one's foresight or expectation, and is undesigned, it is not true that every unforeseen, undesigned, and unexpected event is an "accident," within the ordinary and popular meaning of that term. Thus, a person might voluntarily and knowingly expose himself to a contagious disease, or to excessive heat or cold, or to sudden changes of temperature, or might adopt a strange diet or mode of living; but, if death resulted, it would not be due to an accidental cause, although wholly undesigned, unforeseen, and unexpected. So, if a person suffering from some weakness or disease, should subject himself to conditions which would not injuriously affect persons in ordinary health, but would be dangerous to him, and injury result, it would not be due to an accidental cause. For example, if a person having a diseased heart should take violent exercise voluntarily, and death should result, the cause would not be accidental: *Southard v. Railway etc. Assur. Co.*, 34 Conn. 574. See, also, *Bacon v. United States etc. Assn.*, 123 N. Y. 304, 20 Am. St. Rep. 748; *Sinclair v. Assurance Co.*, 3 El. & E. 478. Although a result may not be designed, foreseen, or expected, yet, if it be the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, it cannot be said to be accidental.

We do not think the cases relied upon by the appellant hold a contrary rule. In *Hamlyn v. Insurance Co.*, 1 Q. B. Div. 750, it appears that a person sustained an injury to his knee in attempting to catch a rolling marble; but it was found that the injury resulted from an unnatural position or movement of the leg, which was not intended by the person ⁵⁴² injured. The injury considered in *North American etc. Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212, was caused by the unintended slipping of a pitchfork in the hands of the person injured in such a manner that it struck him in the bowels, and caused the injury. The case of *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205, involved the act of a person injured in stepping into a hole in a bridge, of which he had no knowledge. And in the case of *Schneider v. Provident etc. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157, it appears that the person injured, in attempting to get upon a moving train, fell under the cars and was killed; but it was not claimed that his fall was the result of his doing what he intended to do.

The certificate in suit made the defendant liable if the death of Feder resulted from an accidental cause. The evidence shows that the cause was the ruptured artery; but that was not accidental, if it was the natural result of an act voluntarily done by Feder. That he did anything but what he intended to do, in attempting to close the shutters, is not shown nor claimed. It is not even shown that he made any unusual exertion in what he did. Had the artery been ruptured while the decedent was sitting quietly in his chair, or while walking at a moderate pace, there would be no ground for claiming that the rupture was accidental; and we do not think that, because the act of closing the shutters may have required a little more exertion than would have been required to remain seated or to walk leisurely, the rupture was accidental. So far as is shown, it may have been, and probably was, due to a weakened or diseased condition of the artery. But, however that was, we are satisfied that there was no evidence which would have authorized the jury to find that the rupture was accidental, within the meaning of the certificate. We conclude that the district court was right in directing a verdict for the defendant, and the judgment rendered is therefore affirmed.

INSURANCE—ACCIDENT—WHAT IS.—An accident, within the meaning of insurance against death from an accidental cause, is an event happening without any human agency, or, if happening

through human agency, an event which, under the circumstances, is unusual, and not expected, to the person to whom it happens: *Carnes v. Iowa etc. Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306; *Meyer v. Fidelity etc. Co.*, 96 Iowa, 378, 59 Am. St. Rep. 374. Death by "accident" means death from any unexpected event which proceeds from an unknown and unforeseen cause, happening without the design of the person acted upon: *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104, 47 Am. St. Rep. 638. See the extended note to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 763, on what is death by accidental means.

FIRST NATIONAL BANK v. GERMAN BANK.

[107 IOWA, 543.]

BANKS AND BANKING—SELECTION OF NOTARY—LIABILITY FOR HIS NEGLIGENCE.—A bank to which a draft is sent by another bank for collection is not liable to the latter for the negligence of a notary public prudently selected by the former to protest the draft for nonpayment, which negligence consisted in the failure of the notary to ascertain the residence of the person who indorsed the draft to the sender bank, or to notify him of the dishonor of the draft. This rule is not changed by the fact that the notary was also assistant cashier of the collecting bank.

BANKS AND BANKING—COLLECTIONS—NEGLIGENCE OF NOTARY.—Where one bank makes another bank its agent for the collection of a draft, it impliedly authorizes it to employ a notary, if necessary, to protest the draft, and if, through the notary's negligence, collection of the draft is prevented, in the absence of reasonable prudence on the part of the collecting bank in the selection of a notary, such collecting bank is not liable for the notary's negligence, but the sender bank must seek its remedy against the notary.

BANKS AND BANKING—SELECTION OF NOTARY—POWERS OF NOTARIES.—In Iowa, giving notice to indorsers of a protested instrument is made a part of the official duty of the notary making the protest, and a collecting bank acts prudently in intrusting to a notary the giving of such notice.

The plaintiff purchased of Farneman a draft, which, coming into defendant's hands for collection, was properly presented for payment, which was refused. The draft was at once placed in the hands of a notary for protest, and through his failure to properly notify Farneman, the plaintiff was denied a recovery against Farneman on the draft: See *Bank v. Farneman*, 93 Iowa, 163. This action is for the amount of the draft and the expenses and costs of that case. Appeal from judgment for defendant.

F. M. Powers, for the appellant.

M. W. Beach, for the appellee.

544 LADD, J. That the draft was sent to the defendant bank for collection, and was presented to the drawee for payment in apt time admits of no doubt: *Hamlin v. Simpson*, 105 Iowa, 125. The exercise of prudence in the selection of a notary public is not questioned. The very gist of the action is that the defendant is chargeable with the negligence of that officer in failing to learn of Farneman's residence, and notifying him of the dishonor of the draft. But a notary is a public officer, appointed by the chief magistrate of the state, is under bond for the faithful performance of his duties as such, and keeps a public record of his acts, certified copies of which may be received in evidence: Code, sec. 373 et seq. He is not a mere agent of the bank, but a public officer sworn to properly discharge his duties to the public. As such officer, the bank may not control his acts, nor dictate in what manner he shall perform his duties. If guilty of malfeasance in the performance of an official act, he, and not the bank, is responsible. That this notary was also an employé of the bank can make no difference. When acting as such officer, he was not discharging his duties as servant. The positions were distinct, and his acts in the capacity of an officer of the state had no connection with the services he owed the bank. Again, the defendant was a mere agent for the collection of the draft, and, owing to its dishonor, deposited it with a notary for protest. "A subagent is accountable, ordinarily, only to his superior agent, when employed without the assent or direction of the principal. 545 But, if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the subagent and the principal, who must, therefore, seek a remedy directly against the subagent for his negligence or misconduct": *Guelich v. National St. Bank*, 56 Iowa, 435, 41 Am. Rep. 110. In making such collections it is usual to employ a notary, and, in forwarding the draft, there was an implied direction to do so, if necessary: See *Mount v. First Nat. Bank*, 37 Iowa, 457. If the defendant exercised prudence in making the selection, its responsibility ended. This is all it could have done had the draft been its own, and surely it will not be held to a higher degree of care when acting for others: *Baldwin v. Bank of La.*, 1 La. Ann. 13, 45 Am. Dec. 72; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Tiernan v. Commercial Bank*, 7 How. (Miss.)

648, 40 Am. Dec. 83; *Bellemire v. Bank of U. S.*, 4 Whart. 105, 33 Am. Dec. 46; *Britton v. Niccolls*, 104 U. S. 766; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Stacy v. Dane County Bank*, 12 Wis. 629; *May v. Jones*, 88 Ga. 308, 30 Am. St. Rep. 154; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; *Bank v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94; *Mechem on Agency*, sec. 514. While there is a conflict in opinion, the rule announced is sustained by the weight of authority and the better reason: See collection of cases in 3 Am. & Eng. Ency. of Law, 2d ed., 808, and note to *Isham v. Post*, 141 N. Y. 100, 38 Am. St. Rep. 775; also *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289.

The distinction between a foreign and an inland bill of exchange should not be overlooked. To charge the makers and indorsers, the former must be protested. Not so with the latter. All that is required is a demand, and, on refusal to pay, notice of dishonor in order to fix liability of the indorsers of an inland bill; and these may be made and given by the holder, or anyone acting in his behalf. By the law merchant, giving notice of dishonor is no part of a notary's official duty, and when he does so he is merely acting as agent of the holder: *Swayze v. Britton*, 17 Kan. 625; ⁵⁴⁶ *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Daniels on Negotiable Instrument*, sec. 960. But it is customary for him, in protesting a bill, to give the proper notice of dishonor: *Proffatt on Notice*, secs. 142, 143. And in many of the states the law merchant is so modified that he is required to give notice. Formerly his certificate might not be received as proof of the protest of an inland bill: *Case v. Heffner*, 10 Ohio, 180. By section 378 of the code, "every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent and the names of all the parties to whom the same were given or sent, with a copy of the instrument in relation to which the notice is served and of the notice itself." Section 379 requires his record and official papers to be filed with the clerk of the court upon his death, resignation, or removal, and provides for certified copies. Very evidently this is for the purpose of perpetuating proof of the notice as well as of the demand and protest. Section 3054 permits a notary "to inform the indorser or any party to be charged, if in the same town or township, by notice deposited in the nearest postoffice to the parties to be charged, on the day

of the demand, and no other notice shall be necessary to charge such party." The advantage in having an inland bill protested by a notary, and notice given by him, is that the evidence is thus perpetuated; and notice to indorsers living in the same town or township may be given by mail, instead of personally. These statutes clearly recognize giving notice as a part of the notary's official duty. Indeed, the term "protest" is ordinarily used as including the entire proceeding necessary to charge indorsers. Notaries are nearly always resorted to for this work, and the owner of the draft may be assumed to have intended this course to be pursued. As said in *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83: "No agent could have been selected with more propriety for the performance of this duty than one whose profession and office were calculated to fit him peculiarly for the discharge. They are almost universally resorted to for the ⁵⁴⁷ purpose. We cannot perceive, therefore, that the bank was wanting either in the degree of skill or diligence which is required under such circumstances to exempt an agent from liability": *Baldwin v. Bank of La.*, 1 La. Ann. 13, 45 Am. Dec. 72; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Smedes v. Utica Bank*, 20 Johns. 384; *Bellemire v. Bank of U. S.*, 4 Whart. 105, 1 Miles, 173, 33 Am. Dec. 46; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Fisher v. State Bank*, 7 Blackf. 610; *Turner v. Rogers*, 8 Ind. 139. *Bank of Lindsborg v. Ober*, 31 Kan. 599, is based on the finding that the statutes of Kansas do not authorize the notary to give notice. Our conclusion rests on statutes allowing a notary as such to perform this duty. Surely, the bank acted prudently in intrusting to a public officer the doing of that which was incumbent on him as an officer of the law to do.

Affirmed.

BANKS AND BANKING—SELECTION OF NOTARY—LIABILITY FOR HIS NEGLIGENCE.—The authorities are divided upon the question whether a bank is liable for the negligence of a notary which it selects to protest a draft or note for nonpayment. The weight of authority seems to be with the principal case in holding that the bank is not liable if it has used reasonable prudence in the selection of the notary: See the extended note to *Allen v. Merchants' Bank*, 34 Am. Dec. 313, 314, where the cases on both sides of the question are collected. As holding that the bank is not liable for the negligence of the notary, see *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Bellemire v. Bank of U. S.*, 4 Whart. 105, 33 Am. Dec. 46, and note; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648,

40 Am. Dec. 83; Baldwin v. Bank of La., 1 La. Ann. 13, 45 Am. Dec. 72; Bank v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94. Contra, see Allen v. Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289; Miranda v. City Bank, 6 La. 740, 26 Am. Dec. 493; Gerhardt v. Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489. See, also, the note to German Nat. Bank v. Burns, 13 Am. St. Rep. 253.

WILCOXEN v. SMITH.

[107 Iowa, 555.]

BUILDING AND LOAN ASSOCIATIONS—USURY—PREMIUMS.—A statute authorizing building and loan associations to collect premiums from borrowing members for the right of precedence in taking loans, and that these premiums so paid, taken with the legal rate of interest, shall not be construed as making the loans usurious, contemplates good-faith bidding of premiums for the right of precedence. Where the monthly payments of premiums and interest together exceed the legal rate of interest, and payments made by a member are designated as premiums merely as a device to evade the law against usury instead of being paid in good faith to secure a loan, the loan is usurious.

BUILDING AND LOAN ASSOCIATIONS—USURIOUS INTEREST AND PREMIUMS—APPLICATION TO MEMBER'S CREDIT.—Usurious interest and premiums paid to a building and loan association by a borrowing member should be applied to the credit of such member as deductions from the amount of his loan.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF BORROWING AND NONBORROWING MEMBERS. In case of the insolvency of a building and loan association, and a liquidation of its affairs, there should be an equitable distribution of its assets less its liabilities. Borrowing members are only entitled to be credited with the actual value of their shares, although by the by-laws of the association and under the terms of their loans they are entitled to the book, or withdrawal, value of such shares. Such provisions in the by-laws and terms of the loans contemplate a going concern, and do not apply when the association has become insolvent and is in the process of final liquidation.

BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF MEMBERS—PLEDGING STOCK AS SECURITY FOR LOAN. Where the articles of incorporation and by-laws of a building and loan association provide for loans to shareholders on the security of their shares of stock, shareholders do not cease to be members of the association by pledging their shares for loans.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF BORROWING MEMBERS—CREDIT FOR VALUE OF SHARES.—Where a building and loan association is insolvent, and its affairs are in process of liquidation, it will be presumed in the absence of proof, that borrowing members are entitled to have credited upon their debts to the association the book value of their shares. The burden of proof is upon one who would rebut this presumption to show the actual value of such shares.

William M. Wilcoxen, for the appellant.

S. B. Snyder, for the appellee.

⁵⁵⁶ ROBINSON, C. J. These cases are submitted together, for the reason that controlling questions are common to all of them. The case of Wilcoxen, receiver, against Smith involves the following facts: The Union Building & Saving Association was organized to transact business as a mutual building association, under and by virtue of sections 1184 to 1187, inclusive; of the code of 1873. On the twenty-eighth day of December, 1894, it was insolvent to the extent that it was unable to pay to the shareholders the full amounts paid by them to the loan fund of the association, and William M. ⁵⁵⁷ Wilcoxen was appointed by the district court of Polk county receiver of the association, and he duly qualified and is acting as receiver. About the 1st of January, 1893, the defendant T. L. Smith subscribed for ten shares of Class A stock of the association, and thereby became a member thereof and shareholder. A few days later he and his wife and codefendant applied to the association for a loan of one thousand dollars, and signed a written obligation, of which the following is a copy:

“January 2, 1893.

“As the holder of ten shares of stock in the Union Building and Saving Association of Des Moines, Iowa, and in consideration of the sum of one thousand dollars advanced to T. L. Smith and wife, Elizabeth R. Smith, by said association, the receipt whereof is hereby acknowledged, we promise, contract, and agree to pay to said association, its successors or assigns, as follows, to wit: The sum of eighteen and 80-100 dollars on the first day of February, 1893, and a like sum of eighteen and 80-100 dollars on the first day of each and every month thereafter—the same being the sum of five and 80-100 dollars as monthly installments; the sum of five dollars for one month’s interest at six per cent per annum, on said loan; the sum of eight dollars monthly as and for premiums bid for said loan. Also all fines and penalties which we may incur as the holder of said ten shares of stock. In accordance with the by-laws of said association, all said payments are to be made on the first day of each and every month, and shall continue to be made until such time as the monthly installments paid in on said ten shares of stock, together with the profits thereon, shall equal their aggregate par value of one thousand dollars. We further agree that if default shall be made in the payment of said sums of money, or any of them, for the period of three

months, after the same are due and payable, the whole of said principal sum, advanced as above, shall at once become due, and, if suit be commenced to enforce the collection of the amount due on this contract, a reasonable sum shall be allowed as plaintiff's attorney fee and taxed with the costs in the case.

“(Signed) T. L. SMITH.

“ELIZABETH R. SMITH.”

To secure the payment ⁵⁵⁸ of the loan, Smith and his wife executed to the association a mortgage on certain lots in an addition to the city of Council Bluffs, and Smith assigned to the association his certificate for ten shares of stock, to be held as further security for the loan. The plaintiff claims that the defendants are more than three months in arrears in the payment of dues, interest, and premiums, and that, by the terms of the loan, the entire amount thereof is due. The Smiths allege that they are entitled to credit as follows: One hundred and eighty-four dollars for premiums paid at the rate of eight dollars per month, ten dollars paid as certificate fees, one hundred and fifteen dollars paid as interest, and two hundred and two dollars and thirty cents paid as dues on stock, and to earnings. They further allege that the loan was usurious, and that the premiums paid were not in fact fixed on competitive bids by the members of the association, but were fixed by it for the use of the money loaned. It is admitted that Smith had made all payments due from him prior to the appointment of the receiver, and that he has not paid anything since that time. He paid as premiums one hundred and eighty-four dollars, and as interest, at the rate of six per cent per annum, one hundred and thirty-eight dollars. It is also admitted that the association is insolvent, and that when the receiver was appointed the book value of the shares of stock held by the association was two hundred and fourteen dollars and ninety-one cents, including profits to the amount of thirty-five dollars and seven cents, which had been apportioned to the stock. The district court found that the loan was usurious and illegal; that the defendants were entitled to credits thereon for the interest and premiums paid and the book value of the stock to the aggregate amount of five hundred and thirty-six dollars and ninety-one cents; and rendered a decree against Smith for the balance of four hundred and sixty-three dollars and nine cents and for one hundred and seventy-six dollars and forty-eight cents for the use of the school fund, and also decreed the foreclosure of the mortgage. The other cases involve similar facts.

⁵⁵⁹ 1. We first inquire whether the loans were usurious. The by-laws of the association provided that its funds should be loaned on real estate security, only to its members, "upon such conditions as the board of directors may dictate"; that the rate of interest should be six per cent per annum on the money actually loaned; that all interest and premiums should be paid monthly; and that all applications for loans would "be granted according to the priority of the application," in case the security should be approved by the board of directors or executive committee. Although the by-laws contemplated the payment of premiums, they did not, in terms, require premiums, nor prescribe any rule for ascertaining what premiums should be paid. The evidence does not show that the board of directors ever adopted any formal rule in regard to them. But it appears that the amount of premium specified in the applications of the borrowers as that which they offered to pay for the desired loan was uniformly eighty cents for each one hundred dollars of the loan. There was no formal bidding for the loans. When a borrower asked for the terms on which he could procure a loan, he was informed, in effect, that a premium of eighty cents on each one hundred dollars of the loan would be required each month. That amount was as definitely fixed and as regularly exacted as was the payment of interest, and both premium and interest were placed in the loan fund of the association. Section 1185 of the code of 1873, which applies to the transactions in question, provides that a mutual building association "shall be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans, as the corporation by its by-laws shall adopt," and that "the dues, fines, and premiums so paid by members, in addition to the legal rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious." That section contemplated good-faith bidding of ⁵⁶⁰ premiums to obtain the right of precedence. The statute does not require the payment of the premium in advance, and the fact that it is to be paid monthly, until the maturity of the loan, would not necessarily impress it with the character of interest paid. Whether an association can fix, in advance of application, the premium which shall be paid, we do not determine, although some authorities seem to hold that the power to do so exists.

But it is clear that the premiums must be fixed and paid in good faith, to secure the loan, and not as a mere device to evade the law against usury: 4 Am. & Eng. Ency. of Law, 2d ed., 1071. The premiums paid in these cases differ from the interest only in name and amount. The mortgages were given to secure the payments of the premiums as well as other sums, and provided that, in the event of foreclosure, the amount due should include all monthly installments, interest, premiums, fines, and penalties due at the date of the decree of foreclosure, less the withdrawal value of the shares of stock held as collateral security. It thus appears that the premium was not a fixed sum, to be paid in any event, but that only so much of it was to be paid as should have accrued at the time of foreclosure. We are satisfied that the sums nominally paid as premiums were for the use of the money loaned, and as truly interest as were the payments made as interest, and that the designation of some of the payments as premiums was a mere device to evade the law against usury. As the monthly payments of premiums and interest together exceeded the highest rate of interest allowed by law, the loan was usurious. The cases of Hawkeye etc. Assn. v. Blackburn, 48 Iowa, 385, and Burlington etc. Asso. v. Heider, 55 Iowa, 424, are not precisely in point, but may be read with profit.

2. The district court rightly refused to allow the plaintiff anything for the interest and premiums paid, and deducted their aggregate amounts from the sums loaned as credits in favor of the defendants. The district court also allowed as a credit in each case the book value of the stock pledged as collateral security, and of that the appellant also complains. As already mentioned, the ⁵⁶¹ mortgage provided that the withdrawal value of that stock should, in the event of foreclosure, be credited on the amount due on the loan. The by-laws of the association provide that any shareholder in good standing, who has paid three months' dues, may, after due notice, and upon the surrender of his certificate, withdraw the full amount of his payments to the loan fund, together with the earnings up to the last dividend period. We understand that the book value of the certificates of stock allowed by the district court in each case was the amount of installments paid on the stock and the earnings thereof to the last dividend period preceding the appointment of a receiver. But the book value was not the actual value, for the reason that the association was insolvent

and unable to pay to each shareholder the book value of his shares. We are therefore required to determine whether the stipulation in the mortgage to which we have referred controls. If it does, then it is manifest that the shareholders who are borrowers, and whose mortgages are foreclosed, will receive more for their stock than will the shareholders who are not borrowers. But the association is composed of members whose rights are mutual, and among whom there should be equality, based upon their payments to the capital stock of the association; therefore, if the borrowing member is allowed for all the payments he has made and the earnings thereof, the losses of the association will fall upon the members who have not borrowed, there will not be an equality between the two classes of members, and great injustice will be done. A court of equity should seek to avoid that result. It was said in *Rabbitt v. Wilcoxen*, 103 Iowa, 35, 64 Am. St. Rep. 162, a case which involved an interpretation of by-laws of the association now under consideration, that it was quite evident that the by-laws "were adopted with reference to doing business, rather than with reference to closing up" the affairs of the association, and that the provision for paying back contributions to the loan fund contemplated monthly receipts for the fund, and that there was nothing to show a purpose to make such payments after 562 the receipts had ceased, and the only business of the corporation is a final settlement and an equitable division of the assets. What was thus said is applicable in this case. The withdrawal value of the shares of stock, as fixed by the by-laws while the association was a going concern, was the full amount of the shareholder's payments to the loan fund, together with the earnings; but the by-laws did not require the payment of that amount when the association had become insolvent, had ceased to do business, and when its affairs were in the process of final liquidation. In such a case, an equitable distribution of the assets, if any, in excess of the liabilities, should be affected; and that requires that the fair value of the shares be ascertained, and that the value thus ascertained, of the shares of the borrowing members, be deducted from the loan to him for which a foreclosure is sought. It is proper to observe, in this connection, that the articles of incorporation and by-laws of the association provide for loans to shareholders upon the security of their shares of stock, and that by pledging their shares for loans the shareholders did not cease to be members

of the association: See Endlich on Building Associations, 2d ed., secs. 121-123, 475, 514; Thompson on Building Associations, sec. 15, p. 129.

Our conclusion that the appellees are only entitled to credits for the actual value of their shares of stock has support in the authorities: See Knutson v. Northwestern etc. Assn., 67 Minn. 201, 64 Am. St. Rep. 410; Eversmann v. Schmitt, 53 Ohio, 174, 53 Am. St. Rep. 632; Price v. Kendall, 14 Tex. Civ. App. 26; Strohen v. Franklin etc. Assn., 115 Pa. St. 273; Christian's Appeal, 102 Pa. St. 184; People v. Lowe, 117 N. Y. 175; Rogers v. Hargo, 92 Tenn. 35; Rogers v. Raines, 100 Ky. 295; Thompson on Building Associations, sec. 2, p. 60; Thompson on Building Associations, secs. 11, 12, 15, pp. 127, 129; Endlich on Building Associations, 2d ed., secs. 45, 77, 514, 531.

⁵⁶³ It follows from what we have said that the district court erred in crediting the defendants with the book value of their shares. The appellant contends that no credit for the shares should be allowed in these actions, because the affairs of the association are not yet settled, and, until that is done, the credits to be allowed for the shares cannot be ascertained. It is true that no credit for the shares should be allowed until their value is ascertained, and it appears that when these actions were heard in the district court the settlement of the affairs of the association had not progressed so far that the value of the shares could have been known. If such value can be determined in these actions, we know of no objection to the allowance of proper credits therefor; but in view of the conditions under which this case is submitted, and the conclusion reached, we do not determine whether there can be a recovery of the amount of the loans and a foreclosure of the mortgages before the credits which should be allowed for the stock can be ascertained. In the absence of proof, it would be presumed that the credits should be the book values of the shares, and the burden would be upon the plaintiff to rebut the presumption and show the actual value of the shares.

3. In the case against C. B. Howard, his codefendant, Margaret Howard, claimed a credit on the plaintiff's cause of action for the value of twelve shares of stock of the association which she held. The appellant insists that she was not entitled to the allowance claimed. Since no allowance was made for the credit claimed, and the appellees do not appeal, it is not necessary to consider the matter further.

4. It is claimed in the case against the congregation that the proof fails to show that its trustees had authority to subscribe for stock and enter into the contract and mortgage in suit. The evidence on their part is not wholly satisfactory, but is sufficient to sustain the action of the trustees. In reaching the conclusion expressed, we have not treated chapter 48 of the acts of the twenty-seventh general assembly ⁵⁶⁴ nor section 1898 of the code as applicable to these cases, and are not to be understood as determining whether they do or do not so apply. Nothing is claimed for them, and, in determining the questions presented to us, we have assumed, without deciding, that section 1185 of the code of 1873 is applicable.

The views we have expressed dispose of all questions involved in the several cases presented in argument. For the reasons shown, the decree in each case reversed; and, since proof of the actual value of the shares when the receiver was appointed was not and could not have been made at the time of the hearing, equitable considerations demand that the causes be remanded to the district court for further proceedings in harmony with this opinion, to ascertain and make due allowance for the credits, if any, for shares of stock to which the appellees are entitled, or, if that cannot be done in these actions, to protect the right of the appellees to recover such credits by appropriate proceedings.

Reversed.

BUILDING AND LOAN ASSOCIATIONS—USURY PREMIUMS.—A building and loan association authorized by statute to receive "premiums bid by members for the right of precedence in taking loans," has no authority to exact from the borrower, where there is no competition, an arbitrary sum in addition to the interest on his loan, where the whole amounts to more than legal interest: *Iowa etc. Assn v. Heidt*, 107 Iowa, 297, ante, p. 197, and note.

BUILDING AND LOAN ASSOCIATIONS—USURIOUS INTEREST—APPLICATION TO MEMBER'S CREDIT.—Where a member of a building and loan association contracts to pay usurious interest and premiums, the court will merely require him to do equity by repaying the money borrowed with legal interest, after being first credited with such payments as he has made, with legal interest: *McCauley v. Building etc. Assn.*, 97 Tenn. 421, 56 Am. St. Rep. 813.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF BORROWING AND NONBORROWING MEMBERS. For the effect of insolvency of a building and loan association on the rights and liabilities of its members, see the monographic note to *Curtis v. Granite State Provident Assn.*, 61 Am. St. Rep. 24-30. See, also, the note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 165.

SCOTT v. HAWK.

[107 IOWA, 723.]

WILLS—SIGNATURE—TESTATOR'S MARK.—Where a testator, being unable to write his signature to his will, makes his mark instead, the will so executed is "signed" within the meaning of the law.

WILLS—EXECUTION—PUBLICATION.—In the execution of a will, nothing more than compliance with the statute is necessary, and publication is not necessary unless made so by statute.

WILLS—EXECUTION—PROOF OF—ATTESTING WITNESSES.—Where a will is signed by the testator's making his mark, and the subscribing witnesses are dead or beyond the jurisdiction of the court, proof of their handwriting is a compliance with the law as to due execution; and it need not be proved that the testator had the will read over to him, or was informed of its contents, before he signed it.

WILLS—SIGNING WITH MARK.—Where a testator signed his will by making his mark, it is not essential to the valid execution of the will that his name be written by one of the attesting witnesses.

C. M. Brown and D. D. Hill, for the appellants.

Hamilton & Donohue, Woodin & Son, and C. H. Mackey, for the appellees.

724 LADD, J. The closing part of the paper purporting to be the will of John Scott, deceased, is as follows:

"Witness my hand this 15th day of June, 1886.

his

"JOHN X SCOTT."

mark.

On the same paper, below the signature, is this attestation:

"The foregoing instrument was at the date thereof subscribed by John Scott, in our presence, and in the presence of each other, and he at the same time declared the same to be his last will and testament, and by his request we sign our names thereto as witnesses thereof, both in his presence and in the presence of each other.

"D. L. FIDLER.

"S. HARND."

The subscribing witnesses died before the trial, but the genuineness of their signatures and the testamentary capacity of the decedent were established beyond controversy. As the testator was unable to write, he made his mark—the cross. Is a will thus executed "signed," within the meaning of the law?

In Schouler on Wills, section 303-306, it is said: "To write out one's own name in full is doubtless the safest course, as well as the most natural; for such compliance best indicates ⁷²⁵ a rational mind, a free will and physical power at the date of execution. But, undoubtedly, the making of his mark by the testator will satisfy the statute; and that, too, as various cases rule, notwithstanding he was able to write at the time. . . . If an illiterate but intelligent testator makes cross-strokes with his pen upon the paper, the act of signature is his own; and so, too, where the hand of the testator, who is physically unable to subscribe without assistance, is guided by another. Wherever, in truth, the act is the testator's own act, *animo testandi*, though with the assistance of another, it is not necessary to prove any express request for assistance on his part." This, we think, a correct statement of the law, and fully sustained by the authorities: *Thompson v. Thompson*, 49 Neb. 157; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Guthrie v. Price*, 23 Ark. 396; *Flannery's Will*, 24 Pa. St. 502; *In re Guilfoyle*, 96 Cal. 598; *Pool v. Buffum*, 3 Or. 438; *Jackson v. Jackson*, 39 N. Y. 159; *In re Jenkin's Will*, 43 Wis. 610; *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163; *Bevelot v. Lestrade*, 153 Ill. 625; *Stephens v. Stephens*, 129 Mo. 422, 50 Am. St. Rep. 454; 2 *Greenleaf on Evidence*, 7th ed., 674; 29 *Am. & Eng. Ency. of Law*, 168.

2. If the statute is complied with, nothing more in the execution of the will is necessary. Thus, publication, as such, is not required in this state: *In re Hulse's Will*, 52 Iowa, 662; *In re Convey's Will*, 52 Iowa, 199; nor is it generally, except when made so by the statute. As far back as *Bond v. Seawell*, 3 Burrows, 1775, Lord Mansfield remarked: "It is not necessary that the testator should declare the instrument he executed to be his last will": *Osborn v. Cook*, 11 Cush. 532, 59 Am. Dec. 155. Indeed, it is not essential that the witnesses know the character of the instrument the signature to which they attest: *Allen v. Griffin*, 69 Wis. 529; *Remsen v. Brinckerhoff*, 26 Wend. 325, 37 Am. Dec. 251; *Dean v. Dean*, 27 Vt. 746; *Linton's Appeal*, 104 Pa. St. 228; *Dickie v. Carter*, 42 Ill. 376; *Leverett v. Carlsle*, 19 Ala. 80; *Brown v. McAlister*, 34 Ind. 375; *Flood v. Pragoff*, 79 Ky. 607.

3. In *Allison v. Allison*, 104 Iowa, 130, we held that, "where subscribing witnesses are dead or beyond the jurisdiction of the court, proof of their handwriting is a compliance with the law

as to due execution." In that case the signature was written by another for the decedent. We discover no reason for a different rule when the will is signed by a mark. Such a distinction has not been made by the authorities, and certainly the recitals of the attestation should be given quite as much weight when the will is signed by a mark as when this is done by writing the name or having some one else do so: See *Jackson v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Nickerson v. Buck*, 12 Cush, 342. The point is made that proponents did not prove the will to have been read over to the deceased before he signed it, or that he was informed of its contents. Whether the burden was upon the proponents to affirmatively show this, we need not now determine. But see notes in 29 Am. & Eng. Ency. of Law, 244. In any event it was included in the execution of the will. As said in *Kirk v. Carr*, 54 Pa. St. 285: "The law allows the attesting signature to speak when the tongue is silent; and it attests that everything was rightly done, unless the act attested be impeached, not negatively merely, but positively": *Carpenter v. Denoon*, 29 Ohio St. 379.

It is suggested that John Scott's name was not written by one of the attesting witnesses. In some states this is required by statute: *St. Louis Hospital Assn. v. Williams*, 19 Mo. 609; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; but such is not the law of Iowa. Indeed, the writing of his name was not essential to the signing of the will, his mark alone being sufficient for that purpose: *Jackson v. Jackson*, 39 N. Y. 159; *In re Savory*, 15 Jur. 1042; *Thompson v. Thompson*, 49 Neb. 157; *In re Bryce*, 2 Curt. Ecc. 325; *Everhart v. Everhart*, 34 Fed. Rep. 85; 29 Am. & Eng. Ency. of Law, 168. As the evidence referred to alone established the execution of the will, we need not ⁷²⁷ consider the alleged errors in admitting other evidence for the same purpose.

Affirmed.

WILLS—SIGNATURE—TESTATOR'S MARK.—The mark of a testator to his will is just as effective as when he signs his name: *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, and note; *Plate's Estate*, 148 Pa. St. 55, 33 Am. St. Rep. 805; *Ray v. Hill*, 3 Strob. 297, 49 Am. Dec. 647; *Chaffee v. Baptist etc. Convention*, 10 Paige, 85, 40 Am. Dec. 225.

WILLS—PUBLICATION.—If the due subscribing and attesting of a will be proved, it need not be shown that the testator made the usual declarations that it was his last will and testament: *Small v. Small*, 4 Greenl. 220, 16 Am. Dec. 253.

WILLS—EXECUTION—PROOF OF.—If the witnesses to a will

cannot be found, or, though found, deny their signatures, circumstantial evidence may supply the deficiency. The handwriting of the witnesses may be proved, and the jury left to determine from all the circumstances whether the will was published with the requisite formalities: *Pearson v. Wightman*, 1 Mill, 336, 12 Am. Dec. 636, and note; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619; *Jackson v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 830.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

HANCOCK NATIONAL BANK v. ELLIS.

[172 MASSACHUSETTS, 39.]

ACTIONS AGAINST STOCKHOLDERS—WHEN TRANSITORY.—An action against a stockholder of a corporation organized under the laws of the state of Kansas, to compel the payment of a debt against the corporation, is transitory.

CORPORATIONS — STOCKHOLDERS — LIABILITY TO CREDITORS—TRANSITORY ACTION.—The liability of a stockholder in a corporation organized under the laws of the state of Kansas for the debts of the corporation is several, and may be enforced by an action against him in any court of general jurisdiction in the state where personal service of process can be made upon the stockholder.

EVIDENCE.—THE LAWS OF ANOTHER STATE are facts to be proved.

EVIDENCE—FOREIGN LAW—QUESTION OF LAW.—If the evidence of foreign law consists entirely of statutes or reports of judicial decisions, the construction and effect of the statutes and decisions are usually for the court alone.

EVIDENCE—FOREIGN LAW—QUESTION OF FACT.—If the evidence of foreign law consists of reports of judicial decisions, the question of what the law is becomes one of fact, where the decisions are conflicting, or where inferences of fact must be drawn.

W. R. Bigelow and H. J. Jaquith, for the plaintiff.

A. Hemenway and E. B. Adams, for the defendant.

39 FIELD, C. J. This case was once before considered by us on demurrer to the declaration: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414. The demurrer having been overruled, the defendant answered, and the cause was heard by a justice of the superior court, without a jury.

At the close of the evidence, both the plaintiff and the defendant made numerous requests for rulings. The presiding justice gave the third, fourth, fifth, sixth, and eighth of the rulings requested by the plaintiff, and all of the rulings requested by the defendant, and made the following special findings: "1. I find that the Commonwealth Loan and Trust Company ceased to do business on February 21, 1891; 2. I find from the evidence that such corporation did not resume business thereafter, and that by virtue of the statutory law of Kansas there was a dissolution of the corporation previous to the date of this writ; 3. There was no legal or competent evidence given at the trial which enabled me to find what were the assets or the liabilities of this corporation at the date of the original judgment against the corporation, or at the date of the issue of execution against it, or at the date of the writ in this action."

The first four rulings requested by the plaintiff which the court gave were as follows:

"3. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the law of Kansas, stockholders in corporations organized under the laws of Kansas are liable severally, and not jointly, to the judgment creditors of the corporation,⁴⁰ who pursue the remedy provided by paragraph 1192 of the General Statutes of Kansas of 1889.

"4. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, stockholders in Kansas corporations who appear as stockholders upon the books of the corporation are conclusively presumed to be stockholders of the corporation within the meaning and liability of said paragraph 1192, already referred to.

"5. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, the stockholder's liability under said paragraph 1192, already referred to, is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder; and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of the corporation of an amount equal to the par value of the stock held and owned by him.

"6. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, the stockholder who is liable under said paragraph 1192 is liable to the judgment creditor of the corporation who first pursues his rem-

edy under the statutes, and is discharged from all further liability by once paying the full amount thereof to such creditor."

Among the rulings requested by the plaintiff which the court declined to give is the seventh, which is as follows:

"7. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, an action to enforce the stockholder's liability under said paragraph 1192, already referred to, is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder."

The rulings requested by the defendant which the court gave are to the effect that the obligations imposed by the statutes of Kansas will be enforced in Massachusetts only as a matter of comity; that the courts of Massachusetts will not enforce them against a resident citizen of Massachusetts unless it appears that no injustice will be done; that these courts are unable to do justice to stockholders resident in Massachusetts who have paid the debts of the corporation and are entitled to sue other ⁴¹ stockholders to enforce contribution, especially if the corporation has been dissolved or has suspended business; that the statutes of Kansas which provide for contribution are a part of a scheme for ultimately compelling stockholders ratably to pay the debts of the corporation, and that, concerning as they do the relations between the corporation and its stockholders, they can be effectually and completely enforced only by the courts of Kansas; and the enforcement of them should be left to those courts.

The Commonwealth Loan and Trust Company is a private corporation, established under the laws of the state of Kansas on February 2, 1887, for the purpose of transacting the business of a loan and trust company, and having places of business at Kansas City in Kansas and in Missouri, and in the city of Boston in Massachusetts. The plaintiff, the Hancock National Bank of Boston, is the same corporation as the Traders' National Bank of Boston. On September 1, 1891, the Traders' National Bank of Boston, having previously lent the Loan and Trust Company twenty-five thousand dollars, received its promissory note therefor signed by the loan and trust company, indorsed on which appear payments of interest and certain sums of money on account of the principal. On September 9, 1893, the bank commenced suit against the loan and trust company on this note in the circuit court of the United States for the district of Kansas, and on December 8, 1893, recovered judgment

therein against the loan and trust company in the sum of sixteen thousand, one hundred and thirty-six dollars and seventy-six cents damages, and twenty-eight dollars and forty-five cents costs of suit; and on April 27, 1894, execution issued therefor, which was returned on May 29, 1894, by the marshal of the United States for said district wholly unsatisfied, after he had made diligent search for any property of the defendant on which to levy the execution and had found none. The present suit was brought in the superior court for the county of Suffolk in this commonwealth on May 25, 1895. The defendant is a resident of the commonwealth. On April 27, 1894, the defendant owned one certificate of five shares of stock of the loan and trust company, and had in his possession as collateral security for the payment of a debt due to him another certificate of five shares, both of which he continued to hold down to the time of the trial here, and the certificates ⁴² were produced at the trial. The certificates are each dated February 7, 1887, and they certify that the defendant is the owner of five shares in the capital stock of the loan and trust company, "transferable only on the books of the said company on the surrender of this certificate, properly endorsed." They differ only in this, that one certificate describes the defendant as "owner of, as collateral security, five shares," et cetera, while the other omits the words "as collateral security." A record of these certificates appears in the transfer-book and in the stock ledger of the corporation. On July 16, 1894, by a decree entered in a suit in the circuit court of the United States for the district of Kansas, William S. Hinman of Boston, Massachusetts, and Waldo H. Howard of Kansas City, Kansas, were appointed receivers of the loan and trust company, for the purpose of winding up the affairs of the corporation. The order appointing the receivers did not purport to dissolve the corporation. The corporation had been established to exist for fifty years from February 2, 1887, and had a capital stock of one hundred thousand dollars, divided into one thousand shares of one hundred dollars each. There was evidence that a great many of the stockholders reside outside of the state of Kansas.

The plaintiff in the present suit put in evidence the General Statutes of Kansas of 1889, paragraphs 1192, 1193, 1199, 1205, 1206, 4080, 4081, 4083, 4084, 4085, 4087, 4167, 4168, 4169, 4170. Paragraphs 1192, 1205, and 1206 are printed in the margin. ⁴³ These statutes, so far as material, were in existence for some time before the defendant became the owner of the cer-

tificates of stock, and before the organization of the loan and trust company. The plaintiff also put in evidence the official reports of the following decisions of the courts of Kansas: Howell v. Manglesdorf, 33 Kan. 194; Wells v. Robb, 43 Kan. 201; Abbey v. Grimes Dry Goods Co., 44 Kan. 415; Abbey v. Long, 44 Kan. 688; Plumb v. Bank of Enterprise, 48 Kan. 484; Hoyt v. Bunker, 50 Kan. 574; Howell v. First Nat. Bank, 52 Kan. 133; Van Demark v. Barons, 52 Kan. 779; Achenbach v. Pomeroy Coal Co., 2 Kan. App. 357; United States Wind Engine etc. Co. v. Davies, 2 Kan. App. 611; Buist v. Citizens' Sav. Bank, 4 Kan. App. 700. The defendant, subject to the exception of the plaintiff, put in evidence the General Statutes of the state of Kansas of 1889, article 12 of the constitution, paragraph 211, and paragraphs 1200 and 1204 of the statutes which are printed in the margin, and also the official report of the decision of the supreme court of Kansas in Hentig v. James, 22 Kan. 326.

44 The courts of Kansas, from the nature of the question, can never directly decide that the liability of a stockholder, under paragraph 1192 of the Genral Statutes of Kansas, is one that may be enforced in any court of general jurisdiction in any other state or country where due service of process can be made upon the stockholder. Only courts of other jurisdictions can decide that question. The courts of Kansas can only express an opinion to that effect, if they entertain it in cases before them, as one of the reasons for the judgment they render in those cases. That opinion the supreme court of Kansas has expressed in Howell v. Manglesdorf, 33 Kan. 194, 195. The other decisions cited of the courts of last resort in Kansas tend to confirm that opinion. None is inconsistent with it. The courts of the United States inferior to the supreme court have uniformly held that the liability under the statutes of Kansas which we are considering can be enforced against a stockholder in any state or district where he can properly be served with process: Whitman v. National Bank of Oxford, 51 U. S. App. 536, affirming on error the judgment of the circuit court in National Bank of Oxford v. Whitman, 76 Fed. Rep. 697; Brown v. Trail, 89 Fed. Rep. 641; American Freehold Land Mortgage Co. v. Woodworth, 79 Fed. Rep. 951, 82 Fed. Rep. 269; McVickar v. Jones, 70 Fed. Rep. 754; Rhodes v. United States Nat. Bank, 66 Fed. Rep. 512; Bank of North America v. Rindge, 57 Fed. Rep. 279. See Auer v. Lombard, 72 Fed. Rep. 209; Mechanics' Sav. Bank

v. Fidelity Ins. etc. Co., 87 Fed. Rep. 113. These decisions are in accordance with the principles of the decisions of the supreme court of the United States with reference to statutes of other states somewhat similar to those of Kansas: *Flash v. Conn*, 109 U. S. 371; *Huntington v. Attrill*, 146 U. S. 657.

The decisions of state courts other than those of Kansas are not uniform upon the question whether the statutory liability of ⁴⁵ a stockholder to creditors of the corporation under these statutes of Kansas can be enforced by a suit against the stockholder in any state where he resides, and can be served with process. In favor of such a doctrine are *Guerney v. Moore*, 131 Mo. 650, *Bagley v. Tyler*, 43 Mo. App. 195, and *Ferguson v. Sherman*, 116 Cal. 169. See *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835. Contra are *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163; *Tuttle v. National Bank of the Republic*, 161 Ill. 497, and *Hancock Nat. Bank v. Farnum*, 20 R. I. 000. *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, is a case which arose upon demurrer, and somewhat resembles *Bank of North America v. Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240, and the decision in both depended upon the averments of the declaration.

This court has many times decided that the statutes of other states, creating the liability of stockholders to creditors of a corporation, which provide for a suit of a special kind to which the corporation and all the stockholders are to be made parties, will not in general be enforced by the courts of this state. It often happens that the courts of this state could acquire no jurisdiction over the corporation which is a necessary party, or over many of the stockholders, and the suit itself is sometimes of a kind unknown to our laws. The proper courts of the state under whose laws the corporation is established have full jurisdiction over the corporation. Whether in such a suit such courts can acquire jurisdiction over all the stockholders, wherever they reside, in order to determine their liability under the statutes to which they may be held to have assented in becoming stockholders, it is unnecessary now to consider. The proceedings are somewhat analogous to the laying of assessments ratably upon all stockholders for the purpose of paying the debts of the corporation in the manner and to the extent prescribed by the statutes. The special remedy provided by the statutes must be pursued, and, as the statutes of a state have no force *ex proprio vigore* beyond the territorial limits of the state, the remedy

usually must be pursued in the state where the corporation has been established and the statutes passed: *Erickson v. Nesmith*, 15 Gray, 221; 4 Allen, 233; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341, 59 Am. Rep. 86; *Bank of North America v. Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240; *Coffing v. Dodge*, 40 167 Mass. 231. See *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Lowry v. Inman*, 46 N. Y. 119; *May v. Black*, 77 Wis. 101, 107; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114; *Nimick v. Mingo Iron Works*, 25 W. Va. 184.

In *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176, 31 Am. St. Rep. 544, the grounds on which the courts of this state entertain an action at law founded on the statutes of another state are stated to be as follows: "Assuming that the cause of action is one not existing at the common law, but created by the statute of another state, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other states shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction: *Blanchard v. Russell*, 13 Mass. 1, 6, 7 Am. Dec. 106; *Prentiss v. Savage*, 13 Mass. 20, 24; *Ingraham v. Geyer*, 13 Mass. 146, 7 Am. Dec. 132; *Tappan v. Poor*, 15 Mass. 419; *Zipcey v. Thompson*, 1 Gray, 243, 245; *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233, 236; *Halsey v. McLean*, 12 Allen, 439, 443, 90 Am. Dec. 157; *New Haven Horse Nail Co. v. Linden Spring*

Co., 142 Mass. 349, 353; *Bank of North America v. Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240."

In *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341, 59 Am. Rep. 86, this court say: "The obligation imposed by the statutes of Ohio upon the stockholders for the purpose of securing the ⁴⁷ payment of the debts of the corporation is quasi ex contractu. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders, and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation. It is for the people or the legislature of each state to determine to what extent, if at all, the stockholders of corporations created by the laws of that state shall be liable for the debts of such corporations. It was early the policy of Massachusetts to make every stockholder liable to have his property taken to satisfy a judgment against a Massachusetts corporation of which he was a member: See *Child v. Boston etc. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; and although this policy has now been changed, and the liability restricted to specific cases, and to corporations of a particular character, yet there is nothing in the laws of Ohio, as stated in the bill, that is so opposed to the general policy of our laws that even citizens of Massachusetts, who voluntarily have become stockholders in Ohio corporations, should not be held to perform the obligations imposed by those laws."

When the liability is distinctly imposed by statute upon the stockholders severally, it would be unfortunate if it could not be enforced against stockholders not resident within the state under whose laws the corporation has been established, on the ground that due process could not be served on them within that state, and the courts of the state where they reside would not take jurisdiction of suits to enforce the liability.

It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations toward creditors of the corporation which they have assumed by becoming stockholders.

The remedy provided by paragraphs 1200 and 1204 of the General Statutes of Kansas, even if applicable to the present case, was not intended to be exclusive when a judgment has

been obtained against the corporation. The present plaintiff has pursued exactly the remedy provided by paragraph 1192 of those ⁴⁸ statutes. That paragraph permits the plaintiff to proceed by action to charge the stockholders with the amount of the judgment. The courts of Kansas hold that the action must be against the stockholders severally, and not jointly. The stockholder who pays more than his proportion of any debt of the corporation may compel contribution from the other stockholders by action. The creditor of the corporation can by action collect the amount of his judgment remaining unpaid of any stockholder, "to any extent equal to the amount of stock by him or her owned, together with any amount unpaid thereon." The stockholder is discharged as against all creditors of the corporation when he has paid the debts of the corporation to this extent. We are unable to see in what manner the enforcement of these statutes by the courts of Massachusetts against stockholders resident here, at the instance of a creditor of the corporation, does any injustice to the citizens of Massachusetts. If they pay what they are required to pay, they have the same remedy for contribution which any other stockholders have. This remedy may be difficult to enforce, because the stockholders may reside in many different states or countries; but the same remedy for contribution is given to all stockholders wherever they reside. The legislature of Kansas has chosen to give to the creditors of certain of its corporations the security which the individual liability of each stockholder affords, to the extent prescribed by its statutes, leaving the burden of enforcing contribution from other stockholders on any stockholder who has been compelled to pay anything in discharge of the debts of the corporation. This somewhat resembles the law of Massachusetts whereby judgment creditors of cities and towns can levy execution on the property of any inhabitant, and such inhabitant is left to enforce contribution from the other inhabitants. Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the state or country under which the corporations are organized, and they cannot complain if this liability is enforced against them.

We are unable to assent to the decision of the supreme court of Pennsylvania in *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835, that the liability of the defendant passed to the receivers of the corporation ⁴⁹ as an asset of the corporation,

because we think that the liability as created by the statutes of Kansas is directly to the creditors, and cannot be enforced by receivers in their own names or in the name of the corporation: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 419, 55 Am. St. Rep. 414; *National Bank v. Hingham Mfg. Co.*, 127 Mass. 563, 567; *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532.

The law of Kansas was a fact to be proved in the present suit. Where the evidence of foreign law consists entirely of statutes or reports of judicial decisions, the constructions and effects of the statutes and decisions are usually for the court alone: *Bride v. Clark*, 161 Mass. 130; *Reyer v. Odd Fellows' etc. Assn.*, 157 Mass. 367, 34 Am. St. Rep. 288; *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81. Where the decisions are conflicting, or where inferences of fact must be drawn, the question of what the law is becomes one of fact: *Wylie v. Cotter*, 170 Mass. 356, 64 Am. St. Rep. 305.

Upon the evidence introduced at the trial, a majority of the court think that the reasonable inference is that the action given to enforce the liability of stockholders under paragraph 1192 of the General Statutes of Kansas of 1889 was intended to be a transitory action of such a nature that it might be brought in any court of general jurisdiction over similar actions in any state or country where service according to the laws of that state or country could be made upon a stockholder.

They are of opinion that the superior court should have found in accordance with the seventh request of the plaintiff. This almost necessarily follows in the view they have taken of the statutes of Kansas, from the four rulings requested by the plaintiff which the court gave, whether they be regarded as rulings of law or findings of fact. It is unnecessary now to consider the other questions which have been argued, or which appear in the bill of exceptions.

The entry must be exceptions sustained.

CORPORATIONS—PERSONAL LIABILITY OF STOCKHOLDERS—ENFORCEMENT OF, IN OTHER STATES.—The liability of stockholders of corporations to creditors is several: *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133. An absolute and unconditional individual liability imposed upon a stockholder is personal, and enforceable everywhere, in the same way that other personal obligations are enforced, and, according to the course of procedure, in the place where the individual sought to be charged is found: See monographic note to *Fowler v. Lamson*, 37 Am. St. Rep. 169, on the enforcement, in other states, of the personal liability of stockholders; but, when a special remedy is given to the creditors of a corporation against its stockholders, the liability of the latter can-

not be enforced in any state except that in which the corporation was organized: Note to *Mandel v. Swan etc. Cattle Co.*, 45 Am. St. Rep. 132. Compare *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654.

EVIDENCE.—FOREIGN LAWS, INCLUDING THOSE OF SISTER STATES, must be pleaded and proved as other facts: *Robertson v. Staed*, 135 Mo. 135, 58 Am. St. Rep. 569; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106.

COMMONWEALTH v. HUBLEY.

[172 MASSACHUSETTS, 58.]

MUNICIPAL CORPORATIONS—ORDINANCES—DEALING IN OLD RAGS.—A city ordinance which forbids the business of collecting, storing, and dealing in old rags, old papers, or other such refuse material, within the thickly settled portions of the city, except when conducted by licensed persons, is reasonable and valid.

POLICE POWER—PROTECTION OF PUBLIC HEALTH—DEALING IN OLD RAGS.—As the business of collecting, storing, and dealing in old rags, old papers, and like material, may be dangerous to the health of the community, it is proper that trustworthy persons only should be permitted to carry it on. When the interests of individuals conflict with the rights of the public, the individual interest must yield to the paramount right.

H. Parker, district attorney, and G. S. Taft, assistant district attorney, for the commonwealth.

W. J. Taft, for the defendant.

⁵⁸ **KNOWLTON, J.** The defendant was convicted of a violation of an ordinance of the city of Worcester, which is as follows: "An ordinance to regulate the collecting and storage of old rags, old papers, or other refuse material. Section 1. No person shall carry on the business of collecting, storing, and dealing in old rags, old papers, or other such refuse material, in any building ⁵⁹ within a circle the radius of which is two miles from the intersection of the south line of Front street and the east line of Main street, unless he is duly licensed therefor by the board of aldermen, for which license, if granted, no fee shall be charged." The only question in the case is whether the ordinance is valid. By its charter the city of Worcester has all the rights to pass ordinances that are given to cities and towns by general laws: Stats. 1893, c. 444, sec. 19. Under the Public Statutes, chapter 27, section 15, towns may make "such necessary orders and by-laws, not repugnant to law, as they may

judge most conducive to their welfare," for the following purposes among others, namely, "for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof." By-laws and ordinances looking to the preservation of the public health are plainly within the authority conferred by this section: See *Commonwealth v. Parks*, 155 Mass. 531. The authority given by the Public Statutes, chapter 80, sections 18, 84, to boards of health of towns to make regulations and pass orders in reference to certain matters affecting the health of the community, cannot properly be construed to prevent the passage of reasonable by-laws by towns, under the authority of the Public Statutes, chapter 27, section 15: *Commonwealth v. Parks*, 155 Mass. 531, 533. Special authority is given by the Public Statutes, chapter 80, section 18, to a board of health "respecting articles which are capable of containing or conveying infection or contagion, or of creating sickness brought into or conveyed from its town." It is manifest that old rags may be very dangerous in this respect. The case of *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, fully recognizes the reasonableness of provisions regulating the business of dealing in rags.

Besides the authority found in the statute already quoted, we have in the Public Statutes, chapter 102, section 28, a provision for licensing "dealers in and keepers of shops for the purchase, sale, or barter of junk, old metals, or second hand articles." There is certainly strong ground for the argument of the district attorney that dealing in rags is within the express language of this statute.

We are of opinion that it was not unreasonable for the city of Worcester to forbid the business of collecting, storing, and dealing in rags within the thickly settled portions of the city except when conducted by licensed persons. The safety of the community ⁶⁰ might be found to require that only persons who could be trusted to observe proper precautions should be permitted to carry on this business. When the interests of individuals conflict with the rights of the public, the individual interest must yield to the paramount right: *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385.

Exceptions overruled.

MUNICIPAL CORPORATIONS—POLICE POWER—SANITARY REGULATIONS.—A city has incidental power of enacting sanitary regulations: Note to *State v. Payssan*, 49 Am. St. Rep. 393. It is within the general power of the state to preserve and promote the public welfare and health, even at the expense of private rights, and this power may be delegated to municipal corporations: *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222.

McISAAC v. NORTHAMPTON ELECTRIC LIGHTING Co.

[172 MASSACHUSETTS, 89.]

MASTER AND SERVANT—ELECTRIC LIGHT COMPANIES—DUTY TO LINEMEN.—An electric light company does not owe to a lineman, whose business it is to work upon poles on which the company's wires are suspended, the duty to inspect its poles below the surface of the ground to ascertain whether they are decayed, and to inform him of that fact if such is found to be the case.

MASTER AND SERVANT—ELECTRIC LIGHT COMPANIES AND LINEMEN—ASSUMPTION OF RISKS—POLES.—When a lineman enters the service of an electric light company for the purpose of working upon poles on which the company's wires are suspended, he assumes the risk that a pole of uncertain age may break and fall when a lineman is working upon it, if he does not take measures to ascertain its condition before going upon it.

ELECTRIC LIGHT COMPANIES—INJURY TO LINEMAN—ACTION—IMMATERIAL EVIDENCE.—A lineman who was injured while in the employ of an electric lighting company by a decayed pole breaking below the surface of the ground, and falling upon him while he was at work upon it, cannot maintain an action against the company for the injury without showing that the company was negligent; and this is not done by proof that the company failed to inspect the pole before the accident. Such evidence is immaterial, for the company owed him no duty to inspect it. On the contrary, in any case where the apparent age of the pole was such as to make it probable that it was not strong enough to sustain a man working upon it, due care on the part of the lineman would require him to examine it just below the surface of the ground before risking himself upon it.

WITNESSES—EXAMINATION OF—STRIKING OUT ANSWER.—A witness' answer which is not responsive to the question may rightly be stricken out.

WITNESSES—RULING OUT QUESTIONS CALLING FOR AN OPINION.—A question which calls for an opinion of the witness in regard to the legal effect of a contract is properly ruled out.

WITNESSES.—IMMATERIAL QUESTIONS asked of a witness are properly ruled out.

Tort, for personal injuries sustained by the plaintiff while in the defendant's employ as a lineman. At the defendant's request, the court ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant. The plaintiff excepted.

J. B. Carroll and W. H. McClintock, for the plaintiff.

W. G. Bassett, for the defendant.

⁸⁹ KNOWLTON, J. The plaintiff was employed by the defendant as a lineman, and was injured by the breaking and falling of a pole on which the defendant's wires were suspended. The pole was about forty feet in length, was set in the ground about five ⁹⁰ feet, and was about thirty-five feet high. The undisputed evidence tended to show that it was badly decayed a few inches below the surface of the ground, so that it broke off square with the strain upon it resulting from the plaintiff's weight and the force from wires drawing upon it after other wires had been removed, which probably had previously tended to counteract the strain from those that remained. The plaintiff contends that the defendant was guilty of negligence in failing to ascertain whether the pole was sound and strong, or to take other precautions for his safety.

The plaintiff was directed to go and take down from the pole the two wires upon it which belonged to the defendant, and to put them on a new pole near by, which had been erected on account of a change of grade in a railroad at a crossing. He went alone to do the work, using a horse and wagon belonging to the defendant to carry such tools and materials as he thought he needed. He was a man of experience in this kind of business, and the method of doing the work he seems to have determined for himself. The pole was of chestnut wood, about eight inches in diameter at the top, and about fourteen inches at the surface of the ground. It had been set between eight and nine years, and the evidence tended to prove that it showed no weakness or sign of decay above the ground.

A fundamental question is whether the defendant owed to a lineman, whose business it was to work upon poles all along the line as occasion might require, the duty to inspect its poles below the ground, and inform the linemen whenever any of them were so decayed as to be unsafe to work upon.

The plaintiff admitted in his testimony that he knew that the life of a pole was limited, and that any pole after a time would become unsafe. He had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant he knew it would be his duty to go upon poles that had been set in the ground an uncertain length of time. He must have known that the work of climbing poles

and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining wires when they were all in their proper positions. He must have known that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which ⁹¹ a lineman was about to work, to see whether it would sustain the strain which the work would put upon it. The evidence was undisputed that it was easy to determine very quickly whether a pole was badly decayed a little below the surface of the ground, and that no skill or experience was required to do it beyond that which was possessed by ordinary linemen. The plaintiff testified that there were risks about the business with which he was familiar as a lineman. We think that one of the most common and obvious of these, in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition before going upon it. All the evidence tends to show that in the ordinary course of the business, the linemen, who are often expected to work alone without supervision, as the plaintiff was working at the time of the accident, would examine the poles for themselves so far as they considered it necessary to do so for their safety. They easily could make any necessary tests to ascertain the condition of the poles as to soundness without the aid of special inspectors, and from their knowledge of common affairs could judge whether the pole was safe to go upon. The plaintiff testified that there were pike poles belonging to the defendant at the shed from which he started with the horse and wagon, and that he was familiar with the use of pike poles in setting new poles and bracing up old ones, and there is nothing to show that he might not have taken some of them to use in the work if he had chosen to.

The burden was upon him to show that the defendant's neglect of some duty caused the accident. We are of opinion that there is no evidence that the risk of falling on account of the weakness of old poles was not a risk of the business which the plaintiff assumed by his contract to work upon such poles. As between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed, and there was, therefore, no evidence of negligence on the part of the defendant.

There was no error in the rulings in regard to the admission of testimony. Evidence that the defendant had made no inspection ⁹² of its pole prior to the accident was immaterial, inasmuch as the defendant owed the plaintiff no duty to inspect it.

The words, "It is not the lineman's business to do it," in Dorsey's answer, were rightly stricken out. To say nothing of other objections, they were not responsive to the question. The question whether it was a "part of the work of a lineman to make that inspection" was properly ruled out. It called for an opinion of the witness in regard to the legal effect of a contract. The question whether linemen "customarily perform that work of inspection" was also immaterial. So far as appeared it was not the custom of anybody to make such an inspection; but in any case where the apparent age of the pole was such as to make it probable that it was not strong enough to sustain a man working upon it, due care on the part of the lineman would require him to examine it just below the surface of the ground before risking himself upon it.

Our review of the main question makes it unnecessary to consider whether the general duty of the defendant to the plaintiff in regard to the strength of the poles on which he was working is affected by the fact that it was not the owner of the pole that broke, but was merely using it in its business under the authority of the owner.

Exceptions overruled.

MASTER AND SERVANT—ELECTRIC LIGHT COMPANIES—ASSUMPTION OF RISKS—POLES.—The linemen of telephone and telegraph companies have no right to rely upon the soundness and safety of poles upon which they are to work. This is especially true where it is a custom for linemen to look out for their own safety and to inspect and test poles for themselves, and to judge of their safety, suitable appliances being at hand for such testing. An experienced lineman must be presumed to have known of this custom, and, if he climbs a pole, when ordered, without such test, and is injured through its rotten condition, the accident must be regarded as due to his own fault or negligence: *McGorty v. Southern etc. Telephone Co.*, 69 Conn. 635, 61 Am. St. Rep. 62.

WITNESSES—IMMATERIALITY.—A question asked of a witness is properly excluded, when the answer to it could not have been material: *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201.

ELLSBURY v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

[172 MASSACHUSETTS, 130.]

RAILROADS—COUPLING OF CARS—ASSUMPTION OF RISKS—LIABILITY FOR INJURY.—If one railroad receives a car from another railroad, with a drawbar different in make and height from that which it uses itself, and an experienced man is ordered to couple the cars together by a link and pin, but he is crushed between the sills of the cars while attempting to make the connection, because one drawbar slides over the other, the railroad company is not answerable for the injury, because the difference in height was an obvious risk assumed by the plaintiff.

Tort for personal injuries received by the plaintiff while in the defendant's employ. The court directed a verdict for the defendant.

J. E. McConnell, for the plaintiff.

F. P. Goulding and W. C. Mellish, for the defendant.

130 HOLMES, J. This is an action of tort for injuries received while attempting to couple two cars together in obedience to orders. The two cars had different kinds of drawbars—one, belonging to the defendant, a Miller, the other belonging to the Pennsylvania Railroad, a Jenny. They could be coupled only by the use of a link and pin. A fellow-servant of the plaintiff put a link into the Pennsylvania car, but, according to the plaintiff's story, the drawbar of that car was too high to allow the connection, and, when the cars came together, it slid over the other one, and the plaintiff, who held the link, was crushed between the sills of the cars. The plaintiff was an experienced man but testified that he could not have told the difference in height, or, it would seem, the alleged impossibility of the connection, **131** until the drawbars were close to each other. At the trial the judge directed a verdict for the defendant.

We are unable to see any ground on which the plaintiff could be allowed to recover. In *Lawless v. Connecticut River R. R. Co.*, 136 Mass. 1, the defendant furnished a locomotive to be used as a switcher. The drawbar was too low for the cars with which it was expected to be used; the plaintiff did not know it, and was not called on to look out for it. In *Bowers v. Connecticut River R. R. Co.*, 162 Mass. 312, there was some slight evidence that the drawbar was defective in having too much lateral play, and that the accident was due to that defect. In *Goodrich*

v. New York Cent. etc. R. R. Co., 116 N. Y. 398, 15 Am. St. Rep. 410, there was no question that the injury was caused by a defect in the bumper. But such cases do not dispose of the present. It was lawful for the defendant to receive a car from another railroad, with a drawbar different in make and height from that which it used itself. It was lawful for it to couple such a car with its own. So far as appears, both cars were in proper condition. The difference in height was not a defect for which the defendant was answerable, either at common law or by statute: *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687. The defendant was not called on to make preliminary measurements, and to warn the plaintiff of the possible difference before setting him to work. The possibility was obvious in a car coming from a different road: *Michigan Cent. R. R. Co. v. Smithson*, 45 Mich. 212, 220. So far as appears, the cars might have been coupled successfully, if not with a straight link, then with a crooked one. It does not appear that the defendant failed to furnish whatever appliances were necessary to do the work. It was not the defendant's duty to see that the plaintiff or his fellow-servants picked out suitable ones, if it furnished them. All that we can say is, that an experienced man was set to do a dangerous thing and met the consequences of failure. We cannot see evidence that the failure was due to the defendant's fault: See *Michigan Cent. R. R. Co. v. Smithson*, 45 Mich. 212; *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687; *Toledo etc. Ry. Co. v. Black*, 88 Ill. 112; *Baldwin v. Chicago etc. Ry. Co.*, 50 Iowa, 680; *Hulett v. St. Louis etc. Ry. Co.*, 67 Mo. 239; *St. Louis 132 etc. Ry. Co. v. Higgins*, 44 Ark. 293; *McDonald v. Norfolk etc. R. R. Co.*, 95 Va. 98; *Norfolk etc. R. R. Co. v. Brown*, 91 Va. 668, 672; *Kohn v. McNulta*, 147 U. S. 238.

Judgment on the verdict.

RAILROADS—COUPLING OF CARS—ASSUMPTION OF RISK.
A brakeman on a railroad train takes upon himself the manifest risk of coupling cars with double deadwoods, and of coupling the car of another road to a caboose, where there is an apparent difference in the height of the couplings: Note to *Chicago etc. R. R. Co. v. Curtis*, 66 Am. St. Rep. 472.

AVERY v. MONROE.

[172 MASSACHUSETTS, 132.]

ATTACHMENT—TRUSTEE PROCESS—PROPERTY IN HANDS OF ASSIGNEE FOR BENEFIT OF CREDITORS.—If a debtor conveys machinery, supplies, and stock on hand in a shoe factory, and book accounts, to an assignee in trust for the benefit of creditors, and creditors do not become parties to the deed, the property, in the hands of the assignee, is subject to trustee process, though nothing has been done about taking possession of it, for the title has passed, as between the parties to the deed, and the assignee or trustee has the immediate right of possession.

Trustee process. Avery and another were the plaintiffs and Monroe and others, including the trustee, were defendants. The writ was dated March 27, 1896, and was served on the trustee on March 28, 1896. The assignment was executed on March 25, 1896. The trustee was charged on his answers to the plaintiff's interrogatories, and he alleged exceptions.

A. A. Wyman, for the plaintiffs.

F. W. Blackmer and E. H. Vaughan, for the trustee.

¹³² HOLMES, J. At the time of the service of the writ in this action the person sought to be charged as trustee had accepted from the principal defendants a conveyance of all their property not exempt from attachment, consisting mainly of machinery, supplies, and stock on hand in a shoe factory, and book accounts, in trust for the defendant's creditors, but had done nothing about ¹³³ taking possession of the property. No creditors appear to have become parties to the deed. The question before us is whether these facts warranted the superior court in charging the trustee.

The title had passed as between the parties to the deed. The trustee had the right to the immediate possession. We do not see why he was not as well "able to turn it out, to be disposed of on execution" (*Andrews v. Ludlow*, 5 Pick. 28, 31) as if he had taken possession by a formal act. The case of *Viall v. Bliss*, 9 Pick. 13, seems probably to have been similar to this, and in Maine it seems settled that in cases like the present the trustee is to be charged: *Lane v. Nowell*, 15 Me. 86; *Arnold v. Elwell*, 13 Me. 261; *Peabody v. Maguire*, 79 Me. 572, 584; *Glenn v. Boston etc. Glass Co.*, 7 Md. 287. See, also, *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 235; *Cushing on Trustee Process*, secs. 53-55; *Drake on Attachment*, 7th ed., sec. 482;

Freeman on Executions, 2d ed., sec. 160. Section 26 of the Public Statutes, chapter 183, is not intended to limit the liability of trustees under deeds like this to cases where they have taken possession, but simply to declare the existing law that they may be charged by trustee process under section 21. Rev. Stats., c. 109, sec. 35, Commissioners' note. We are of opinion that the property was "intrusted in the hands" of the trustee within the Public Statutes, chapter 183, section 21.

It is suggested that it does not appear from the trustee's answers to interrogatories that all the defendants had executed the deed before service of the writ. It does not appear that they had not. The deed was executed, and, if it be material, may be presumed to have been executed by all three of the defendants on the day of its date, as it certainly was by two of them.

Exceptions overruled.

GARNISHMENT—ASSIGNEE FOR BENEFIT OF CREDITORS.—Property held by an assignee for the benefit of creditors is not subject to garnishment by a creditor: *Calumet Paper Co. v. Haskell Printing Co.*, 144 Mo. 331, 66 Am. St. Rep. 425, and note.

BERGNER & ENGEL BREWING COMPANY v. DREYFUS.

[172 MASSACHUSETTS, 154.]

A CORPORATION HAS ITS DOMICILE in the jurisdiction of the state which created it, and, as a consequence, has no domicile anywhere else.

CORPORATIONS—ACTION BY A FOREIGN CORPORATION—DISCHARGE OF INSOLVENT AS A BAR.—A discharge under the insolvency laws of Massachusetts does not discharge a debt due from the Massachusetts debtor to a corporation of another state, having its principal place of business in the latter state, although it has a place of business in Massachusetts, and a license under the laws of that state, and has complied with its laws regulating foreign corporations doing business there, respecting the appointment of a person upon whom process may be served.

Contract for beer and ale sold and delivered to the defendant. The writ was dated September 30, 1896. The plaintiff was a corporation organized under the laws of Pennsylvania. Its principal offices, where its meetings were held and its books kept, were in Philadelphia, where it manufactured and sold malt liquors. It had no brewery, and manufactured nothing, in Massachusetts. It had an office and a storeroom, however, in Boston, which it hired in its own name, and where it sold its

products at wholesale. It hired an agent, styled a manager, a bookkeeper, and delivery men for the conduct of its business in Boston, and it owned there a complete set of office furniture and horses and wagons sufficient for the delivery of the goods which it sold in Boston. All of these employés resided in Massachusetts. The plaintiff had complied with the statutes of Massachusetts regulating foreign corporations having a usual place of business in that commonwealth and had received from the board of police of the city of Boston a license, in its name, of the fourth class, to sell intoxicating liquors in that city as a wholesale dealer. The defendant, a citizen of Massachusetts, ordered of the plaintiff, at its office in Boston, beer and ale, which were delivered to him in Boston from the plaintiff's storeroom there and some time after this purchase was made, and the goods delivered, the defendant filed his petition in insolvency. He received his discharge before this action was brought. The plaintiff did not prove its claim in those proceedings, and never received payment of any part thereof. The plaintiff contended, in this action, that the discharge was not a bar, because it was a citizen of Pennsylvania. There was a judgment for the plaintiff, and the defendant appealed.

H. H. Baker, for the plaintiff.

B. S. Ladd and T. F. Strange, for the defendant.

¹⁵⁵ HOLMES, J. This is a suit by a Pennsylvania corporation to recover a debt for goods sold and delivered here. The only defense is a discharge in insolvency under our statutes, which, of course, commonly is no defense at all. This was re-affirmed unanimously in 1890, after full consideration of the objections now urged, and it was decided, also, not for the first time, that the general language of the insolvent law was not intended to affect access to Massachusetts courts by a local rule of procedure unless the substantive right was barred by the discharge: *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589. The grounds urged for an exception in the present case are that the ¹⁵⁶ plaintiff, although its brewery and main offices are in Pennsylvania, has an office in Boston and maintains here a complete outfit for the distribution of its products, that it has a license of the fourth class under the Public Statutes, chapter 100, section 10, and that it has complied with the laws regulating foreign corporations doing business here, including, we assume, that

which requires the appointment of the commissioner of corporations its "attorney upon whom all lawful processes in any action or proceeding against it may be served": Stats. 1884, c. 330, sec. 1; see Stats. 1895, c. 157.

We are of opinion that these facts are not enough to bring the plaintiff under the operation of the state insolvent law. It is settled that doing business here does not have that effect upon a citizen or corporation of another state: *Guernsey v. Wood*, 130 Mass. 503; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11. It is not pointed out what the license, whether valid or void, has to do with the matter, and we do not perceive that complying with the laws concerning foreign corporations ought to have any greater effect. We think it plain that the words just quoted from the Statutes of 1884, chapter 330, section 1, do not mean that, by appointing the commissioner of corporations their attorney, foreign corporations agree not only that publication of notice in insolvency proceedings shall have the effect of personal service upon them in an action, but also that, as a result, they shall be subject to the jurisdiction of the state insolvency proceedings so as to be bound by a discharge.

The most that could be deduced from the appointment would be that, if on other grounds a foreign corporation were subject to the operation of the insolvent law, publication of notice should have the same effect upon it as upon other creditors in making it a party to the proceedings. But we do not suppose that it would be suggested that a natural person, a creditor who was a citizen of another state, lost his immunity and became a party to the proceedings merely by his accidental presence in the commonwealth at the moment when the notice appeared: *Olivieri v. Atkinson*, 168 Mass. 28. No greater direct effect than the actual presence of a natural person can be attributed to the presence of an attorney authorized to receive service of process. Furthermore, we doubt whether the ¹⁵⁷ act of 1884 purports to give the appointment even so much effect as that. The language discloses no thought about insolvent proceedings, and when, at a later date; it was decided to make foreign corporations subject to be put into insolvency here, it was thought proper to provide expressly that service upon the commissioner of corporations should be a sufficient notice to the corporation of the presentment of the petition by creditors against it. Stats. 1890, c. 321, sec. 1. If the act of 1884 attempted to do more than we have construed it to at-

tempt, its validity might be drawn in doubt as requiring the corporation to surrender a privilege secured to it by the constitution and laws of the United States: *Southern Pac. Co. v. Denton*, 146 U. S. 202, 207.

The independent ground on which it is urged that the plaintiff is subject to the insolvent law in the present case is that the plaintiff is domesticated in this state, as shown by the facts above recited, of which the appointment of an attorney is only one. The word "domesticated," which was used in the argument for the defendant, presents no definite legal conception which has any bearing upon the case. We presume that it was intended to convey in a conciliatory form the notion that the plaintiff was domiciled here—"resident," in the language of Public Statutes, chapter 157, section 81—and therefore barred by the language and legal operation of the act. It could not be contended that the corporation was a citizen of Massachusetts. In such sense as it is a citizen of any state, it is a citizen of the state which creates it and of no other. But there are even greater objections to a double domicile than there are to double citizenship. Under the law as it has been, a man might find himself owning a double allegiance without any choice of his own. But domicile, at least for any given purpose, is single by its essence: *Dicey on Conflict of Laws*, 95. A corporation does not differ from a natural person in this respect. If any person, natural or artificial, as a result of choice or on technical grounds of birth or creation, has a domicile in one place, it cannot have one elsewhere, because what the law means by domicile is the one technically pre-eminent headquarters which, as a result either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined. It is ¹⁵⁸ settled that a corporation has its domicile in the jurisdiction of the state which created it, and as a consequence that it has not a domicile anywhere else: *Boston Investment Co. v. Boston*, 158 Mass. 461, 462, 463; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 450; *Martine v. International etc. Ins. Co.*, 53 N. Y. 339, 346, 13 Am. Rep. 529. The so-called modifications of this rule by statutes like the act of 1884 do not modify it because jurisdiction of the ordinary personal actions does not depend upon domicile, but only upon such presence within the jurisdiction as to make service possible: See *In re Hohorst*, 150 U. S. 653. But the operation of our insolvent law by its very terms may, and in this

case does, depend upon the domicile of the creditor, and as there can be no doubt either in fact or in law that the plaintiff was domiciled in Pennsylvania in such a sense that a statute like the Public Statutes, chapter 157, section 81, would hit it there, it cannot have been domiciled here for the same purpose at the same time.

Judgment for the plaintiff affirmed.

FIELD, C. J., DISSENTED. He took the ground that the discharge should be upheld as valid until the supreme court of the United States has decided to the contrary. "There is no doubt," he said, "that the words of the statutes relating to discharges in insolvency, as well as the words of the discharge itself, purport to make the discharge pleaded in the present action a bar to the action. Section 81 of the Public Statutes, chapter 157, provides that the debtor, upon obtaining his discharge, shall be absolutely discharged from all provable debts founded 'on any contract made by him subsequently to the last day of July, 1838, and while an inhabitant of this state, if made within this state, to be performed within the same, or due to any person resident therein at the time of the first publication of the notice of the issuing of the warrant.' The contract sued on was made while the defendant was an inhabitant of this state, and was made within the state, to be performed within the state, and, on the part of the plaintiff, was performed within the state; and therefore it is exactly within the terms of the statutes. Whether or not the debt is due to a person resident within this state at the time of the first publication of the notice may depend upon the question whether the plaintiff corporation had a domicile within the state."

"There is no contention," he said, "that our statutes relating to insolvency are in violation of the constitution of Massachusetts. The contention is, that in their application to creditors who are citizens of other states than Massachusetts they are in violation of the constitution of the United States." He admitted that the decisions of the supreme court of the United States upon the meaning of the federal constitution are conclusive; but the real difficulty, he said, is in determining the principle on which that court has decided that a discharge, granted under a state insolvency law enacted before the contract sued on was entered into, will not discharge a debt due under the contract, if due to a citizen of another state than that in which the law was passed.

"This difficulty," he said, "has often been noticed"; and to illustrate it, he quoted from *Marsh v. Putnam*, 3 Gray, 551, in which Mr. Justice Thomas, speaking for the court, in carefully reviewing the decisions of the supreme court of the United States up to the time of that decision, said: "In this state of the opinions of that tribunal to which, on these subjects, we look for guidance, we know of no safe rule but stare decisis, and yet not go beyond the precise limits of the decisions." "The principal decisions of the su-

preme court of the United States on this subject," said Field, C. J., "since those considered in *Marsh v. Putnam*, 3 Gray, 551, are *Baldwin v. Hale*, 1 Wall. 223; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Gilman v. Lockwood*, 4 Wall. 409; and *Denny v. Bennett*, 129 U. S. 489." His honor then discussed and quoted from these cases, as well as from *Stoddard v. Harrington*, 100 Mass. 87, 97 Am. Dec. 80, 1 Am. Rep. 92, to show that he was unable to see any conflict between the insolvent laws of Massachusetts and the federal constitution. He also cited *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Kelley v. Drury*, 9 Allen, 27; *Ogden v. Saunders*, 12 Wheat. 213, 358, and *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340, in support of his views. In *Stoddard v. Harrington*, 100 Mass. 87, 97 Am. Dec. 80, 1 Am. Rep. 92, the court said: "The suggestion that the power of a state over the contracts of its citizens is limited by the power to make them parties to the proceedings in insolvency does not seem to us well founded, because we think that the effect of the insolvent law qualifies the contract from its inception; and the question of the sufficiency of the notice to creditors to make them so far parties as to be bound by these proceedings does not seem to be one over which the courts of the United States have any peculiar jurisdiction." "This decision," said the dissenting justice, "wherein it was held that if a contract is made between two citizens of Massachusetts within the state, and one of them afterward removes therefrom and becomes a citizen of another state, and the other then obtains in Massachusetts, where he continues to reside, a discharge under the insolvent laws, which were in force when the contract was made, the discharge is a bar to an action against him on the contract, has not been overruled by this court, and the precise case does not seem to have come before the supreme court of the United States."

He said that the doctrine that the statutes of a state, *ex proprio vigore*, have no extraterritorial force is a doctrine of the common law, and not a provision of the constitution of the United States; and claimed that a discharge under the bankruptcy laws of England is held, in the courts of England, to be a discharge of debts due to citizens or subjects of other countries, without any regard to the question whether the courts of England have any jurisdiction over the foreign creditors whereby they could render personal judgments against them: Citing *Dicey on Conflict of Laws*, 448 et seq.; *Ellis v. McHenry*, L. R. 6 Com. P. 228. He also considered the better opinion to be that a corporation can have a domicile other than that in the state under whose laws it was incorporated: Citing *Attorney General v. Bay State Min. Co.*, 90 Mass. 148, 153, 96 Am. Dec. 717; *Ricker v. American Loan etc. Co.*, 140 Mass. 346, 350; *Garham v. Mutual Aid Soc.*, 161 Mass. 357, 366; and said that: "If the operation of the insolvent laws of Massachusetts upon contracts made here between persons domiciled here can be avoided upon the ground that they were made in behalf of corporations organized under the laws of other states, although having usual places of business here, and subject to be sued here, then it will be possible for

foreign corporations to obtain substantially all the business advantages in Massachusetts conferred by our laws without subjecting themselves to the liability of having debts due to them, and contracted within the commonwealth, discharged by proceedings in insolvency on the part of inhabitants of the commonwealth with whom the contracts were made.

"I know of no decision in the supreme court of the United States upon exactly the state of facts appearing in the present case, and, on principle, I do not see why the contract made and performed here by the parties in this case is not subject to be discharged in accordance with the laws of Massachusetts in force when the contract was made. The contract undoubtedly is to be governed generally by the laws of Massachusetts, and the plaintiff has elected to bring its suit in a Massachusetts court, and the plaintiff is not only subject to be sued in Massachusetts, but may be made an insolvent debtor under the insolvency statutes of Massachusetts: Stats. 1890, c. 321. To enforce our insolvency statutes in the case of such a contract entered into here between such parties, after the insolvency statutes were passed, does not seem to me to give the statutes any extraterritorial force, and the plaintiff corporation seems to me, in reference to contracts made here with citizens or inhabitants of Massachusetts, to be subject to our laws.

"I am not aware that anyone has pointed out the particular provisions of the constitution of the United States which our insolvency statutes would violate if it were held by the courts of Massachusetts that the discharge pleaded in the present action was a bar to the action. The early decisions of the supreme court of the United States were only to the effect that contracts entered into before the passage of the insolvency statutes of a state, or entered into in another state than that in which such statutes had been passed, but to which the contracts were not subject, could not be discharged under the statutes, because, under the constitution of the United States, no state could pass a 'law impairing the obligation of contracts.' But this seems inapplicable to contracts entered into within a state, subject to the laws thereof, when insolvency statutes are in existence within the state; and are a part of the laws to which the contracts are subject.

"It is evident that, in recent years, this court, in its anxiety to do nothing which might seem to be in violation of the constitution of the United States according to the later decisions of the supreme court of the United States, has rendered decisions which go far in the direction of the decision of the court in the present case: *Guernsey v. Wood*, 130 Mass. 503; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11. In *Guernsey v. Wood*, 130 Mass. 503, the plaintiff was not a corporation, but a citizen of Pennsylvania, never resident in Massachusetts. In *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589, it does not appear that the plaintiff corporation had any usual place of business in Massachusetts, or had complied with our statutes regulating foreign corporations doing business here, or was subject to

legal process here. The same is true of *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11. In none of these cases was there anything in the nature of the license shown in the present case. These distinctions seem to me important. Certainly it is going beyond the 'precise limits' of the decisions of the supreme court of the United States if it is held that the discharge pleaded in the present suit is invalid.

"I think that this court ought to uphold the validity of the discharge, in the present case, until the supreme court of the United States has decided to the contrary. The question, of course, becomes of little importance when there are bankruptcy laws of the United States in force; but such laws have been in force only for short periods of time, and the insolvency laws of Massachusetts are not repealed, but only suspended, by the bankruptcy laws of the United States."

CORPORATIONS—DOMICILE OF.—A corporation can have but one legal residence, and that must be within the state or sovereignty creating it, although by comity it may be allowed to do business, through its officers and agents, in other jurisdictions: *Ireland v. Globe etc. Reduction Co.*, 19 R. I. 180, 61 Am. St. Rep. 756; *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 75 Am. Dec. 219; *Aspinwall v. Ohio etc. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329.

INSOLVENCY—EFFECT OF DISCHARGE AS AGAINST NON-RESIDENT.—A discharge under the insolvent laws of one state does not affect a nonresident, unless he voluntarily appears in the insolvency proceedings, and becomes a party thereto. A bankruptcy or insolvency statute can have no extraterritorial operation, and a citizen of one state cannot be required to appear in the courts of another, and submit to their exercise of jurisdiction over him, or to their discharge of an obligation due him, though it was created, or is to be performed, in the state where such courts have jurisdiction. As the insolvency court does not have jurisdiction of him, in such a case, it cannot discharge his right to recover his debt: *Scamman v. Bonslett*, 118 Cal. 293, 62 Am. St. Rep. 226, and note; *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340. See, also, note to *Morrill v. Morrill*, 23 Am. St. Rep. 113, and *Chase v. Henry*, 166 Mass. 577, 55 Am. St. Rep. 423.

PARMENTER MANUFACTURING Co. v. HAMILTON.

[172 MASSACHUSETTS, 178.]

BANKRUPTCY—EFFECT OF FEDERAL STATUTE UPON STATE INSOLVENCY PROCEEDINGS.—The United States bankruptcy law of July 1, 1898, supersedes all state laws in regard to insolvency from the date of the passage of the statute. Hence insolvency proceedings commenced in the state courts after the passage of that law are unauthorized.

Bill in equity, praying that a decree of the judge of insolvency of September 6, 1898, on a petition of the defendants that a

warrant issue to a messenger to take possession of the plaintiff's estate, be reversed; that the warrant be recalled and the petition dismissed; and that the messenger be enjoined from interfering with the property of the plaintiff. The plaintiff contended that the state insolvent law had been suspended by the act of Congress of July 1, 1898. The defendants, Hamilton and others, demurred for want of equity, and the question of law was reserved by the justice who heard the bill for the opinion of the full court.

E. I. Morgan and R. A. Stewart, for the plaintiff.

C. M. Rice, for the defendants.

¹⁷⁸ KNOWLTON, J. The United States bankruptcy law passed on July 1, 1898, ends with the following provision: "This act shall go into full force and effect upon its passage; provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it."

The question in this case is, whether this act so far superseded the insolvency laws of this commonwealth from the time of its ¹⁷⁹ passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898. This depends upon the intention of Congress, as manifested by the language above quoted. Of the power of Congress to pass an act having this effect, there is no doubt: U. S. Const., art. 1, sec. 8, cl. 4; *Griswold v. Pratt*, 9 Met. 16; *In re Klein*, 1 How. 277, 280, 281; *Sturges v. Crowninshield*, 4 Wheat. 122, 192; *Ogden v. Saunders*, 12 Wheat. 213, 369. The language is materially different from that of the bankruptcy act of 1867, and from that of the earlier bankruptcy law of 1841: See U. S. Stats., March 2, 1867; *Day v. Bardwell*, 97 Mass. 246; *Judd v. Ives*, 4 Met. 401; *Swan v. Littlefield*, 4 Cush. 574. The argument that the change in question was intentional is almost irresistible. The act is to "go into full force and effect upon its passage." That is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage. Among these rights is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the rights to have acts of bankruptcy

affecting the settlement of estates determined by it (section 3), to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions determined by it (section 4), and to have preferences and liens governed by the provisions of it (sections 60 and 67). These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions. The only limitation upon the full and complete operation of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions and four months in the case of involuntary petitions. Whenever the proceedings are commenced, the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of state courts provides for cases commenced in those courts before the passage of the act. The plain implication is, that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect ¹⁸⁰ from the time of its passage, except that the filing of petitions is to be postponed for a short time.

We are of opinion that the language was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute.

Demurrer overruled.

BANKRUPTCY—EFFECT OF FEDERAL STATUTE ON STATE INSOLVENCY LAWS.—The passage of a bankrupt act by Congress renders it supreme; the state laws must yield to it, and can no longer operate upon persons or cases within the purview of such act. It suspends the state laws on the same subject, but does not affect pending proceedings: See monographic note to *Norton v. Cook*, 23 Am. Dec. 353, 354, on what demands may be discharged under state insolvent laws; *Minot v. Thacher*, 7 Met. 348, 41 Am. Dec. 444; note to *Sanford v. Sanford*, 17 Am. Rep. 207.

SHANE v. LYONS.

[172 MASSACHUSETTS, 199.]

HUSBAND AND WIFE—ASSAULT IN WIFE'S ABSENCE, BY HUSBAND, WHO IS HER AGENT—WIFE'S LIABILITY.—A married woman is civilly answerable for personal injuries inflicted, not in her presence, upon a third person, by her husband, while acting within the scope of his authority as her agent.

Tort, for an assault and battery committed by the husband of the defendant. It appeared on the trial that he was her authorized agent for the care of her real estate; that at the time of the alleged assault upon the plaintiff, Mamie Shane, by the husband, and in the commission thereof, he was acting within the scope of his authority as such agent; and that his wife was not then present. The court was requested by the defendant to rule as follows: "The defendant in this case, being the wife of the person committing the alleged assault, cannot be held responsible therefor, because of the fact that she is his wife; that is to say, a wife cannot be held legally responsible for an assault committed by her husband, whether her husband was at the time her lawful agent for certain purposes, such as the care of her real estate, or not." This ruling was refused, and the jury returned a verdict for the plaintiff, exceptions being alleged by the defendant.

D. B. Kelly and J. F. Batchelder, for the plaintiff.

C. H. Poor and E. B. Fuller, for the defendant.

200 HAMMOND, J. The only question is whether a married woman can be civilly responsible for personal injuries inflicted not in her presence upon a third person by her husband while acting within the scope of his authority as her agent.

The act of the agent is the act of the principal, and she must be held unless there is something in the relation of husband and wife which takes the case out of the general rule.

It is contended by the defendant that, while the wife is liable for assaults and other torts committed by her when not acting under the coercion of her husband, she is not so liable when acting under such coercion, and that, as the husband was present at the time of this assault, she herself, if she had been personally present and had actually joined in the assault, would have been presumed to have acted under coercion, and so would

not have been liable, and that a fortiori she ought not to be held liable when absent.

But this presumption of coercion is simply a presumption which may be rebutted by evidence, and a wife may be held responsible, either criminally or civilly, for assaults committed of her own free will and while actually under no coercion from her husband, even although he be present and join therein: *Commonwealth v. Eagan*, 103 Mass. 71; *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270, and cases cited; *Ferguson v. Brooks*, 67 Me. 251.

Our statutes have given to a married woman the right to hold, manage, and dispose of her property in the same manner as if she were sole, and a necessary consequence of this enlargement of her power is a corresponding increase of her responsibility for all acts relating thereto and growing out of her management and control. If she appoints her husband as her agent in such a matter, and in making such appointment acts of her own free will and without coercion from him, we see no reason for regarding her as incapable of authorizing any act to be done by him in her name, and on her behalf, or for shielding her from responsibility.

It must be held that whatever is done within the scope of the agency is done by her authority

Exceptions overruled.

AGENCY—LIABILITY OF PRINCIPAL FOR TORTS OF AGENT.—A principal is liable to third persons, in a civil suit, for the torts of his agent, committed in the course of his employment, although the principal did not authorize, justify, or participate in, or know of, such misconduct: *Note to Jarvis v. Manhattan Beach Co.*, 51 Am. St. Rep. 733.

WHITING v. PRICE.

[172 MASSACHUSETTS, 240.]

FRAUD—ACTION FOR FALSE REPRESENTATIONS IN SALE OF BOND—WHAT WILL SUPPORT.—Although a certain bond of an electric light company states that payment thereof is "secured by a first mortgage on all the property, rights, and franchises of said company (present and future acquired)," a representation made, in selling the bond, that it was secured by a mortgage of real estate of the value of half a million dollars, will support an action for false representations, where it appears that the company owned no real estate and that the bond was not secured by a mortgage of real estate.

FRAUD—FALSE REPRESENTATIONS IN SALE OF BOND—RELYING ON REPRESENTATIONS—QUESTION FOR JURY.—In an action for false representations in the sale of a bond, where it appears that the defendant referred the plaintiff to the sources of his information, and advised the plaintiff to consult the persons named, the question as to whether he ought to have done so may depend on circumstances, and it is not improper to leave it to the jury.

DAMAGES—MEASURE OF, FOR FALSE REPRESENTATIONS IN SALE OF BOND.—The measure of damages, in an action for false representations in the sale of a bond, is the difference between the actual value of the bond, at the time of purchase, and its value if it had been what it was represented to be, secured as represented. Subsequent events may be considered in arriving at the two values, at the time of the purchase, though they show the market value of the bond to have been worthless.

FRAUD—FALSE REPRESENTATIONS IN SALE OF BOND—RETURN OF BOND.—In an action for false representations in the sale of a bond, the plaintiff is not required to return the bond to the defendant.

Tort against Price and Parker for false representations in the sale of a bond of the Jacksonville Electric Light Company. There was a verdict for the plaintiff, and the defendants alleged exceptions.

G. A. Perkins, for the plaintiff.

H. J. Fuller and W. H. Pond, for the defendants.

240 HOLMES, J. This is an action for false representations, which has been before the court already upon a demurrer to the declaration: *Whiting v. Price*, 169 Mass. 576, 61 Am. St. Rep. 307. It now comes up upon exceptions taken at the trial.

The bond respecting which the representations were made stated that payment was "secured by a first mortgage on all the property, rights, and franchises of said company (present and future acquired)." The representation proved was that the **242** bond was secured by a mortgage of real estate of the value of half a million dollars. In fact, the company owned no real estate, and the bond was not secured by a mortgage of real estate. An exception was taken to a ruling allowing the plaintiff, even if he had read the bond, to recover for this further statement about the security. We see no reason for the exception, and none is offered for it. The alleged representations did not contradict the bond; they made specific and definite what the bond left vague.

The defendant Parker stated to the plaintiff at North Attleborough what he alleged he had been told by several persons, named, living in the town and known to the plaintiff. The de-

defendant advised the plaintiff to see and consult with them. The defendant asked a ruling to the effect that the plaintiff could not recover for such statements when he was referred to the sources of the defendant's alleged information. This was refused, the judge intimating that it depended on the circumstances, and seemingly leaving it to the jury whether the plaintiff ought to have inquired of the persons named. So far as appears, this was the proper course. It is true that in cases of representations as to quality, correspondence to sample, et cetera, of goods exhibited in the buyer's presence, the court has ruled that if the buyer had full means of ascertaining the truth for himself, he could not set up that he was imposed upon by fraud: *Salem India Rubber Co. v. Adams*, 23 Pick. 256, 265; *Slaughter v. Gerson*, 13 Wall. 379; *Long v. Warren*, 68 N. Y. 426; and that a verdict has been directed partly on that ground: *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215. See *Bayly v. Merrel*, Cro. Jac. 386. But the requirement as it has been worked out does not call for more than reasonable diligence: *Holst v. Stewart*, 161 Mass. 516, 522, 42 Am. St. Rep. 442; *Brown v. Leach*, 107 Mass. 364, 368; *Nowlan v. Cain*, 3 Allen, 261, 264; and distance or other slight circumstances have been held sufficient to warrant leaving the question to the jury: *Holst v. Stewart*, 161 Mass. 516, 522, 523, 42 Am. St. Rep. 442. See *Burns v. Lane*, 138 Mass. 350, 355, 356; *Whiteside v. Brawley*, 152 Mass. 133. The matter may have been confused a little by not distinguishing between seller's talk as to value and the like, where the rule is absolute in ordinary cases that the buyer must look out for himself, and representation of facts concerning ²⁶² which even sellers may be held liable for fraud, and as to which the buyer may be warranted in relying wholly on the seller's word. The notion that the buyer must look out for himself sometimes has been pressed a little too strongly into the latter class of cases.

The judge, at the defendant's request, instructed the jury that the measure of damages was the difference between the actual value of the bond at the time of the purchase and its value if it had been what it was represented to be, secured as represented: *Morse v. Hutchins*, 102 Mass. 439, 440; *Nash v. Minnesota Title Ins. etc. Co.*, 163 Mass. 574, 587, 47 Am. St. Rep. 489. He then instructed them further that they "would inquire what the value of the bond was at that time in view of the circumstances which have transpired," and what it would have been if it had been secured as according to the plaintiff's

evidence the defendant said it was, adding, "You will take into account what has happened since in order to determine what the value of the bond was and what it is now." The defendants excepted to the further instruction. With some hesitation, we have come to the conclusion that this exception should be overruled with the rest. The reference to the present value of the bond, in the last words quoted, cannot be taken to have overruled the express direction as to how the damages were to be measured. We think that what was added to that express direction merely amounted to allowing the jury to take subsequent events into account in arriving at the two values at the time of the purchase, which the jury were directed to compare. We cannot say that this was wrong. The market value of the bond at the time of the sale may have been illusory, because the public also may have been deceived. The statement which we have quoted, appearing in the bond of an electric light company, certainly conveys the impression that it has a plant and property which naturally would include land. Or if it be answered that the public, which makes market prices generally, looks a little further than such vague words, the question remains, What would have been the value of a bond adequately secured, when the public were willing to pay par for one depending so far upon speculation for its value that subsequent events have shown it to be worthless? The subsequent events may be likened to the coming out of a ²⁴³ latent disease existing in a horse at the time of a fraudulent sale, to take an example put by Cockburn, C. J., in *Twycross v. Grant*, 2 C. P. Div. 469, 544. It was intimated that subsequent events might be considered in *Coffing v. Dodge*, 167 Mass. 231, 241, and it was decided that they might be, in order to determine the worth of stock, in *Peek v. Derry*, L. R. 37 Ch. Div. 541, 591, et seq., a decision not affected by the subsequent reversal by the house of lords, on the ground that fraud was not made out: *Derry v. Peek*, L. R. 14 App. Cas. 337. See, also, *Hubbell v. Meigs*, 50 N. Y. 480, 492; *Sedgwick on Damages*, 8th ed., sec. 257. We may follow these cases without regard to the possible conflict between the measure of damages in this state, and that adopted elsewhere. It would seem probable that in the present case the jury found the bond to have been worthless, and gave the plaintiff no more than he paid, but with that we have nothing to do.

The plaintiff did not offer to return the bond to the defendants. He was not bound to do so. The action is for false rep-

representations and proceeds upon an affirmation of the purchase: *Whiteside v. Brawley*, 152 Mass. 133, 134. The dictum in the case of *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25, cited for the defendant, has no bearing. There the plaintiff was induced by the defendant's false representations to take a contract of insurance from a third person. The insurance company was solvent, and the policy was a good policy. The representations went to collateral matters. The plaintiff had a right to rescind, however, which he exercised. It was intimated in the course of the decision that, if he had chosen to keep the contract, his damages would have been only nominal, which very likely was true, as the plaintiff got what he expected. Here the ground of complaint is that the plaintiff did not get what he expected.

Exceptions overruled.

FRAUD — FRAUDULENT REPRESENTATIONS — DILIGENT INQUIRY AS TO FALSITY IS NOT ESSENTIAL TO ACTION.—A representation, if a falsehood, and acted upon by one deceived thereby, is always fraudulent: *Note to Hecht v. Metzler*, 60 Am. St. Rep. 914. Diligent inquiry to discover whether representations are false is not essential to recovery in an action for false representations: *Cottrill v. Krum*, 100 Mo. 397, 18 Am. St. Rep. 549.

DAMAGES — MEASURE OF, FOR FALSE REPRESENTATIONS.—In an action for false representations in the sale of property, real or personal, the measure of damages is the difference between the value thereof as sold and what its value would have been if it had been as represented: See monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 562, on action to recover for false representations: *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92; note to *Hecht v. Metzler*, 60 Am. St. Rep. 914.

MURPHY v. COMMONWEALTH.

[172 MASSACHUSETTS, 264.]

STATUTES.—THE TERM "EX POST FACTO" applies only to penal or criminal matters.

STATUTES.—A PENAL STATUTE IS EX POST FACTO where it, in relation to the offense or its consequences, alters the situation of the party accused of the crime to his disadvantage; as, where the penalty is increased, or the accused is deprived of substantial rights or privileges to which he was entitled as the law stood when the offense was committed.

STATUTES — EX POST FACTO LAWS — PROCEDURE — PRISON DISCIPLINE.—Statutes which relate to procedure or penal administration or prison discipline are not, as a general rule, objectionable as being *ex post facto*, though passed after the offense, even where the effect may be, in the last two instances, to enhance the severity of the confinement.

STATUTES—EX POST FACTO LAWS.—THE LEGISLATURE cannot, under the guise of laws relating to procedure or prison discipline or penal administration, take away or interfere with any substantial right or privilege which was secured to a party by the law as it was when the offense was committed.

STATUTES—CONSTITUTIONALITY.—A law cannot be constitutional in some cases and unconstitutional in others involving like circumstances and conditions. If it is unconstitutional as to any it is unconstitutional as to all.

STATUTES—EX POST FACTO LAWS—INTERFERING WITH CREDITS FOR GOOD BEHAVIOR.—If the effect of good conduct, on the part of a prisoner, under existing laws, is to shorten his term of imprisonment, and to give him a right to his discharge at the expiration of the shortened term, a subsequent statute which has the effect of taking away the right of deduction for good behavior, or which interferes with it to the disadvantage of the convict, is clearly ex post facto, because it practically lengthens the sentence which was provided by law for the offense at the time when it was committed.

STATUTES—EX POST FACTO LAWS—CREDITS FOR GOOD BEHAVIOR.—A statute which gives a convict a right to deductions for good behavior, thus practically shortening his term of imprisonment, cannot be construed merely as a measure of prison discipline or regulation, and therefore liable to change from time to time, as the legislature may see fit, without interfering with any rights on the part of the convict.

STATUTES.—A CRIMINAL STATUTE IS TO BE CONSTRUED PROSPECTIVELY, to apply to sentences for offenses committed after it took effect.

Indictment for embezzlement. The sentence attacked was pronounced on May 28, 1896.

E. F. McClennen, for the plaintiff in error.

J. M. Hallowell, assistant attorney general, for the commonwealth.

²⁶⁵ MORTON, J. This is a petition for a writ of error to reverse a sentence of the superior court for the county of Essex by which the petitioner is confined in the state prison. The plea is in nullo est erratum, and therefore admits the facts well assigned in the petition: *Bodurtha v. Goodrich*, 3 Gray, 508, 512; *Conto v. Silvia*, 170 Mass. 152. From those and from the record of the superior court, it appears that the offenses of which the petitioner was convicted were committed between July 19, 1892, and November 17, 1893, but that he was sentenced under the Statutes of 1895, chapter 504, entitled "An act relative to sentences to the state prison," which took effect on the first day of January, 1896, and which provides, in section 1, that "when a convict is sentenced to the state prison, otherwise than for life, or as an habitual criminal, the court imposing the

sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict shall be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he is convicted, and the minimum term shall not be less than two and one-half years."

The petitioner was indicted under the Public Statutes, chapter 203, section 40, and was found guilty of sixty-three counts, each of which, except in a few instances, alleged the value of the property stolen to be more than one hundred dollars. The penalty is prescribed in section 20 of the same chapter, and is imprisonment in the state prison not exceeding five years, or fine not exceeding six hundred dollars and imprisonment in the jail not exceeding two years, if the value of the property stolen exceeds one hundred dollars. The maximum sentence imposed in the present case was not more than fifteen years and the minimum not less than ten. The maximum term was, therefore, only a small fraction of ²⁶⁶ that authorized by law, and it is agreed that it probably does not exceed the sentence which would have been imposed before the passage of the Statutes of 1895, chapter 504.

The error assigned is, that the sentence and the commitment pursuant to it were wholly unauthorized and void, because the statute under which the sentence was imposed was *ex post facto*, and contrary to section 10, article 1, of the constitution of the United States, and to article 24 of the declaration of rights of the constitution of Massachusetts.

The statute was considered by this court in *Commonwealth v. Brown*, 167 Mass. 144, 146, and again in *Oliver v. Oliver*, 169 Mass. 592. It was also before the court in *Commonwealth v. Crowley*, 168 Mass. 121. In *Commonwealth v. Brown*, 167 Mass. 144, the court says that it sees no reason why the statute should not be construed to apply to all sentences in the cases referred to in it passed after it went into effect. But it is evident that the attention of the court was directed more to the effect of the feature of indeterminate sentences upon the constitutionality of the statute than to other matters. The fact that the statute might interfere with his rights or privileges in regard to a permit to be at liberty, and was, therefore, objectionable as *ex post facto*, was not suggested in the defendant's brief. In *Oliver v. Oliver*, 169 Mass. 592, the point decided was that a sentence imposed under the statute in ques-

tion must be regarded as a sentence for the maximum term, and not for the minimum or any intermediate term. The point now raised was not involved nor considered in that case. *Commonwealth v. Crowley*, 168 Mass. 121, followed *Commonwealth v. Brown*, 167 Mass. 144. There was in the opinion no discussion of the statute, and the motion in arrest of judgment did not aver that the statute was unconstitutional because of its interference with the defendant's rights to a permit to be at liberty for good conduct under the Public Statutes, chapter 222, section 20, or otherwise. An examination of the defendant's brief shows that the ground on which it was contended that the statute was unconstitutional was the indeterminate feature of the sentences. This had been fully considered and disposed of in *Commonwealth v. Brown*, 167 Mass. 144, and hence a reference to that case was all that was necessary. We discover nothing in either of these cases which precludes us from examining the question now presented. The statute was also considered by the United States ²⁶⁷ circuit court for the first circuit when this plaintiff was before it recently on a petition for a writ of habeas corpus, which it was led to deny, and to leave the petitioner to his writ of error, largely, as we infer, on account of the views concerning the statute which this court was supposed to have expressed in the two cases of *Commonwealth v. Brown*, 167 Mass. 144, and *Oliver v. Oliver*, 169 Mass. 592, referred to above: *In re Murphy*, 87 Fed. Rep. 549.

We have already quoted section 1 of the act. By section 2 it is provided that at any time after the expiration of the minimum term the commissioners of prisons may issue a permit to the convict to be at liberty on such terms and conditions as they may deem best, and may revoke the permit at any time previous to the expiration of the maximum term. The permit shall not be issued without the approval of the governor and council or unless the commissioners shall be of the opinion that the convict will lead an orderly life if set at liberty. Other provisions contained in the act were taken from the Statutes of 1884, chapter 152, sections 1 and 2, which will be referred to later.

The statutes applying to the petitioner's case which were in force when he committed the offenses of which he was convicted are the Public Statutes, chapter 222, sections 20-22, and the Statutes of 1884, chapter 152. There were and are statutes relating to the issue of permits to persons confined for drunkenness in jails, houses of correction, or other places under

the jurisdiction of the county commissioners, or in the county of Suffolk under that of the board of directors of public institutions and who have reformed, and also to persons imprisoned in the reformatory prison for women who have reformed. But those are not applicable to this case.

The Public Statutes, chapter 222, section 20, provide that every officer in charge of a prison or other place of confinement shall keep a record of each person whose term is not less than four months and "every such prisoner whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment shall be entitled to a deduction from the term of his imprisonment to be estimated as follows"—stating it. Later in the section, it is provided: "Each prisoner who is entitled to a deduction . . . shall receive a written permit to be at liberty during the time thus deducted upon such terms as the board granting the same shall fix." The permits are to be issued to ²⁶⁸ prisoners in the state prison by the commissioners of prisons, and they "may at any time revoke the same, and shall revoke it when it comes to their knowledge that the person to whom it was granted has been convicted of any offense punishable by imprisonment.

The Statutes of 1884, chapter 152, section 1, provides that if the holder of a permit shall violate any of its terms or conditions, or any law of this commonwealth, "such violation shall of itself make void said permit." Section 2 provides that, when any permit has been revoked or has become void, the board granting it may cause the holder of it to be arrested and returned to the place in which he was confined, and, when so returned, he "shall be detained therein according to the terms of his original sentence," and "the time between his release upon said permit and his return to said place of confinement shall not be taken to be any part of the term of the sentence." These provisions are embodied in the Statutes of 1895, chapter 504, and are the ones previously referred to. The other provisions of the statutes of 1884, chapter 152, are not now material.

From this examination it appears that the Statutes of 1895, chapter 504, differs from the statutes which were in force at the time when the offenses were committed, and that the differences consist: 1. In the matter of indeterminate sentences; 2. In Providing that the permit shall not be issued till after the expiration of the minimum sentence, and in omitting any provision for deductions for good behavior; and 3. In leaving the is-

sue of the permit to the discretion of the commissioners, and in providing that it shall receive the approval of the governor and council. The petitioner contends that the effect of these differences may be to make the term of imprisonment longer than it would have been under the laws in force at the time the offenses were committed, and to change his position in other respects to his disadvantage, and that therefore the statute is unconstitutional and void. The commonwealth contends that the provisions are in the nature of prison discipline, or of penal administration or criminal procedure, and are not, therefore, open to the objection of being *ex post facto*.

As the term "*ex post facto*" has been construed, it applies only to penal or criminal matters. The objection to *ex post facto* legislation consists in the uncertainty which would be introduced ²⁶⁹ thereby into legislation of a penal or criminal character, and the injustice of punishing an act which was not punishable when done, or of punishing it in a different manner from that in which it was punishable when done. But not all retrospective legislation is unconstitutional as being *ex post facto*. The question in each case is, whether it will increase the penalty, or operate to deprive a party of substantial rights or privileges to which he was entitled as the law stood when the offense was committed, or "in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage": *Kring v. Missouri*, 107 U. S. 221, 228; *Calder v. Bull*, 3 Dall. 386; *Cumming v. State*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Medley*, petitioner, 134 U. S. 160; *Duncan v. Missouri*, 152 U. S. 377; *Thompson v. Utah*, 170 U. S. 343; *Hartung v. People*, 22 N. Y. 95; *Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 N. Y. 124. A statute which mitigates the penalty is not objectionable, though passed after the offense: *Commonwealth v. Wyman*, 12 Cush. 237; *Commonwealth v. Gardner*, 11 Gray, 438; *Dolan v. Thomas*, 12 Allen, 421, 424; nor, speaking generally, are statutes which relate to procedure or penal administration or prison discipline, even though the effect may be in the last two instances to enhance the severity of the confinement: *Duncan v. Missouri*, 152 U. S. 377; *Cook v. United States*, 138 U. S. 157; *Hopt v. People*, 110 U. S. 574; *Gut v. State*, 9 Wall. 35; *Commonwealth v. Hall*, 97 Mass. 570; *Carter v. Burt*, 12 Allen, 424; *Hartung v. People*, 22 N. Y. 95; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825; *Ex parte Bethurum*, 66 Mo. 545; *People v.*

Mortimer, 46 Cal. 114; Cooley's Constitutional Limitations, 3d ed., 272; Black's Constitutional Law, sec. 184. No one has a right to insist that particular remedies shall remain unchanged, or that courts and their jurisdiction and the proceedings in them shall continue unaltered, or that there shall be no departure from established methods in prison discipline or penal administration. But the legislature, under the guise of laws relating to procedure or prison discipline or penal administration, cannot take away or interfere with any substantial right or privilege which was secured to a party by the law as it was when the offense was committed: *Kring v. Missouri*, 107 U. S. 221, 232; *Thompson v. Utah*, 170 U. S. 343; *Medley, Petitioner*, 134 U. S. 160. To ²⁷⁰ deprive him in any manner of such right or privilege would be to increase the penalty. In determining in any case whether this is or is not the effect of a statute, it is to be borne in mind that the constitutional provision was intended as a security to life and liberty, and as a safeguard against the infliction of any punishment except such as was duly authorized by law, and it is to be construed so as to promote these ends.

As the law formerly stood in this state, the effect of good conduct on the part of the prisoner was to shorten his term of imprisonment, and to give him a right to his discharge at the expiration of the shortened term: Stats. 1857, c. 284; Stats. 1858, c. 77; Stats. 1859, c. 108; Gen. Stats. c. 178, sec. 47. This was so said in the Opinion of the Justices, 13 Gray, 618. And although the Statutes of 1857, chapter 284, was entitled, "An act concerning the discipline of the state prison," and the acts of 1858 and 1859 were respectively entitled, "An act concerning the discipline of jails and houses of correction," and "An act to amend an act concerning the discipline of jails and houses of correction," it does not seem to have occurred to the justices that the right of the convict was affected thereby. They declared, on the contrary, that the act of 1857, upon the construction of which the answer to the question proposed mainly depended, gave the convict a right to have his term reduced and shortened by the scale provided in it for good behavior, and bore upon the sentence and shortened the term of imprisonment, and afforded "an assurance of the highest character that, upon the condition of good behavior, the convict shall have the promised benefit of an earlier release." And again they said that "the benefit promised, in consideration

of good behavior, was intended to be an actual reduction of sentence as a right, and not as a favor," and "therefore operated upon the sentence itself." It would seem plain, therefore, that a subsequent statute which interfered to his disadvantage with the right of deduction for good behavior to which a convict was entitled at the time the commission of the offense under the acts of 1857, 1858, and 1859, would have been unconstitutional and void, notwithstanding the fact that those acts related, according to their titles, to the discipline of the state prison, and to that of jails and houses of correction, and therefore appeared to pertain to prison regulation. To have taken ²⁷¹ away the right of deduction for good behavior, or to have interfered with it to the disadvantage of the convict, would have been in effect to lengthen the sentence which was provided by law for the offense at the time when it was committed; and a statute which did that clearly would have been *ex post facto*: See Opinion of the Justices, 13 Gray, 618; *Kring v. Missouri*, 107 U. S. 221; *Medley*, Petitioner, 134 U. S. 160; *Thompson v. Utah*, 170 U. S. 343; *Commonwealth v. McDonough*, 13 Allen, 581; *In re Canfield*, 98 Mich. 644; *Ex parte Hunt*, 28 Tex. App. 361.

The question then is, whether the changes made in regard to deductions for good behavior by the Statutes of 1880, chapter 218, which were subsequently incorporated into and are now found in the Public Statutes, chapter 222, section 20, have so modified the rights which convicts had, under statutes previously in force, that those committing offenses after the passage of the Statutes of 1880, chapter 218, cannot be said to have anything in the nature of a right to deductions for good conduct, and to a "permit to be at liberty which could not be interfered with to their disadvantage by subsequent legislation—in other words, whether the effect of the Statutes of 1880, chapter 218, and of the Public Statutes, has been and is to make deductions for good behavior and the issuing of a permit a matter of favor, and not in any sense a matter of right.

It should be noted in passing, that the words "with the consent of the governor and council," were inserted in the General Statutes, chapter 179, section 51, which, with one other amendment that is not now material, is a re-enactment of the Statutes of 1857, chapter 284, section 1. These words were not in the commissioners' report (c. 180, sec. 50), and it does not appear how they came to be inserted. They were not in the General

Statutes, chapter 178, section 47, and were omitted from the Statutes of 1880, chapter 218, and are not found in any subsequent statute.

It seems to us that, under the Statutes of 1880, chapter 218, and the Public Statutes, chapter 222, section 20, the convict was and is entitled to deductions for good conduct, and to a permit to be at liberty for the time thus deducted, as a matter of right rather than of favor. The object was to furnish an incentive to good conduct while the convict was in confinement, by offering him a reward therefor. Applying the language of the Opinion of the Justices, 13 Gray, 618, the provisions of the Statutes of 1880, chapter 218, and of the Public Statutes, "afford an assurance of the highest character that, upon condition of good ²⁷² behavior, the convict shall have the promised benefit" of certain deductions, and a permit to be at liberty for the time thus deducted from the term of his sentence. Though the provisions of the Statutes of 1880 and of the Public Statutes may not bear as directly upon the sentence as those of the Statutes of 1857 did, we cannot doubt that the purpose was to secure to the convict a substantial advantage as a reward for his good conduct, which practically would have the effect of shortening his sentence. It is true that the prison commissioners could revoke the permit without cause shown, or for a violation of its terms, and that they are bound to revoke it when they have knowledge that the convict has been convicted of an offense punishable by imprisonment. But this does not affect the right of the convict to deductions, and to a permit in the first instance. Besides, it is to be assumed that the power of revocation will not be exercised capriciously. Unless the provisions of the statute were intended to secure a substantial advantage to the convict as a reward for his good conduct, to the enjoyment of which he could look forward with reasonable certainty, if he did not violate the terms of the permit, nor commit an offense punishable by imprisonment, it is difficult to see what object the legislature had in view.

Conlon's case, 148 Mass. 168, is relied on as tending to show that the convict had no right to a permit. One of the contentions of the petitioner in that case was that his confinement in the reformatory was unlawful, because his removal to it from the state prison to which he had been sentenced interfered with or took away his right to deductions for good conduct, under the Public Statutes, chapter 222, section 20. But neither that

statute nor the Statutes of 1880, chapter 218, of which it was a re-enactment, was in force at the time when the petitioner committed the offense of which he was convicted, and no question under either was properly before the court. Further, deductions for good conduct under the Public Statutes, chapter 222, section 20, are not limited to persons confined in the state prison, but extend to those confined in "a prison or other place of confinement," and the legislature had the right to change the place of confinement of any prisoner so long as the penalty was not thereby aggravated: *Carter v. Burt*, 12 Allen, 424. Lastly, the permit in that case was issued under the Statutes of 1884, chapter 152, and was revoked by the commissioners for a violation of its conditions, ²⁷³ as they had the right to do. The decision would have been the same if the permit had issued under the Public Statutes, chapter 222, section 20, and had been revoked for a like cause. The nature of the right to a permit under the Public Statutes, chapter 222, section 20, was therefore not material to the decision.

For these reasons the case, though rightly decided, cannot be regarded as authoritative on the question now before us. And we think, as has been already observed, that the Statutes of 1880, chapter 218, and the Public Statutes, chapter 222, section 20, secured to prisoners who were convicted of offenses committed when they were in force, and who came within their scope, deductions for good conduct and permits to be at liberty as something to which they were entitled as of right rather than by favor, for faithful observance of the rules, and for not having been subjected to punishment, and that their rights in these respects could not be taken away or interfered with to their disadvantage by subsequent legislation.

The next question is, whether the Statutes of 1895, chapter 504, alters or may alter to their disadvantage in a substantial manner the position of those committing offenses prior to its passage and while the Public Statutes, chapter 222, section 20, was in force. We think that it is clear that such might be its effect. In case the maximum sentence was for fifteen years, the convict would be entitled for good conduct to deductions under the Public Statutes, chapter 222, section 20, which would shorten the term to twelve. Under the Statutes of 1895, chapter 504, however, he could be sentenced for a maximum term of fifteen years and a minimum of thirteen, or of any number less than fifteen and more than twelve. In the present case, the minimum was ten, and it is possible that the statute might operate more bene-

ficially in the case of the petitioner than the Public Statutes, chapter 222, section 20, and the Statutes of 1884, chapter 152, would have operated. But that cannot avail. A law cannot be constitutional in some cases and unconstitutional in others involving like circumstances and conditions. If it is unconstitutional as to any, it is unconstitutional as to all.

It is suggested in *In re Murphy*, 87 Fed. Rep. 549, that the supposed leniency of the Statutes of 1895, chapter 504, might have led the court to make the maximum sentence longer than it otherwise would, and the implication is, that this also would render the statute objectionable as to past offenses. But it is obvious that this argument might prevent the application of any mitigative statute ²⁷⁴ to past offenses, and we should hesitate to pronounce the act unconstitutional on that ground.

It is also said in *In re Murphy*, 87 Fed. Rep. 549, that under the Statutes of 1895, chapter 504, "important conditions were added which would permit the recall of a permit, and still others which would revoke it absolutely. The most serious new provision is, that the act of 1895 directs that, if a permit is revoked, no portion of the time the prisoner may have been at liberty under it shall be taken to be any part of the term of his sentence." But this last provision, which is called "the most serious new provision" of the Statutes of 1895, is found in the Public Statutes, chapter 222, section 21, and in the Statutes of 1884, chapter 152, section 2, and was not therefore new, and was in force when the offenses were committed of which the petitioner was convicted, and applied to persons confined in the state prison. So far as the revocation of permits is concerned, it is doubtful if the Statutes of 1895, chapter 504, adds anything new. Under the Public Statutes, chapter 222, section 20, the commissioners have power, as already observed, to revoke permits without cause shown. They have the same power under the Statutes of 1895, chapter 504. Under the Statutes of 1884, chapter 152, a violation by the holder of a permit of any of its terms or conditions, or of any law of this commonwealth, rendered the permit void. The same is true under the Statutes of 1895, chapter 504. And the provisions as to the return of the holder of a permit which has been revoked or has become void are the same in the Statutes of 1895, chapter 504, as in the Statutes of 1884, chapter 152, except that the latter contains a provision that the order for the arrest and return of the convict may be served by any officer authorized to serve civil or criminal process in any county in the commonwealth which is omitted from the Statutes

of 1895, chapter 504. So far, therefore, as revocation and the results which follow it, and violation of the terms and conditions of the permit, or of any law of the commonwealth, and the results which follow that are concerned, there would seem to be nothing in the statute of 1895 which as compared with the laws in force when the offense was committed changes the situation of the petitioner for the worse.

The petitioner further contends that, independently of the effect of the statute upon his right to deductions for good behavior and to a permit to be at liberty, the statute is inoperative as an *ex post facto* act because it renders the duration of his ²⁷⁵ sentence uncertain, and gives to the prison commissioners the power to fix the term of his imprisonment. But there is no uncertainty in the sentence itself. That, it has been held, is in effect for the maximum term: *Oliver v. Oliver*, 169 Mass. 592, and *Commonwealth v. Brown*, 167 Mass. 144; *People v. Illinois State Reformatory*, 148 Ill. 413; *State v. Peters*, 43 Ohio St. 629. The convict may be released before its expiration, either by an absolute or conditional pardon from the governor (*Public Statutes*, c. 218, secs. 12 et seq.), or after the expiration of the minimum term by a permit from the commissioners approved by the governor and council. In the latter case, he is under sentence till the expiration of the maximum term: *Oliver v. Oliver*, 169 Mass. 592. It is as correct, it seems to us, to say that the duration of his sentence is uncertain because the governor may pardon him absolutely or conditionally at any time, as it is to say that it is uncertain because after the expiration of the minimum term the commissioners may release him before the expiration of the maximum term on a permit approved by the governor and council, and as correct to say that in case of a pardon the governor fixes the term of imprisonment, as to say that in case of release upon a permit the commissioners fix it. Moreover, "the form of sentence," as was said in *Commonwealth v. Brown*, 167 Mass. 144, "is made to recognize and carry out a policy familiar to our legislation and acted on heretofore without question." In no just sense can it be said, we think, that the duration of his sentence is uncertain, or that the determination of the term of the imprisonment is taken from the courts where it belongs, and left to the prison commissioners: See *People v. Illinois State Reformatory*, 148 Ill. 413; *George v. People*, 167 Ill. 447; *State v. Peters*, 43 Ohio St. 629; *Miller v. State*, 149 Ind. 607; *contra*, *People v. Cummings*, 88 Mich. 249.

The petitioner also insists that requiring the approval of the governor and council to a permit is a serious interference with his rights, and without anything more would render the statute void as an *ex post facto* law. But we think that the provision does not affect any substantial right to which the petitioner was entitled when the offenses were committed, but relates rather to a matter of procedure.

There can be no doubt, we think, that in the matter of permits, ²⁷⁶ the legislature could have substituted some other tribunal for the prison commissioners, or could have added to the number of the commissioners on the same principle that it could have abolished the court which existed when the offenses were committed, and have created another court for the trial of such offenses, or have added to the number of the judges of the existing court. If this had been the only change, the effect of it would have been merely to require that so many more persons should act in regard to the matter of permits. The petitioner would have still been entitled to deductions for good behavior, and to a permit to be at liberty during the time of such deductions, and there would have been no increase in the penalty for the offense or other change to his disadvantage. It is not contended that the terms and conditions of permits issued when the offense was committed, or the rules of government of the prison then in force, must remain the same.

By the Statutes of 1898, chapter 371, which is in amendment of and in substitution for the Statutes of 1895, chapter 504, and which went into effect since the indictment was found in this case, it is now provided that a convict who has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to release at the expiration of the minimum term, and shall be given a permit to be at liberty during the unexpired portion of the maximum term, which permit shall be issued by the commissioners of prisons. The approval of the governor and council is no longer required, and the permit is no longer to be issued at the will and pleasure of the commissioners.

We think, therefore, that the statute of 1895 could not be declared unconstitutional as an *ex post facto* act because it requires the approval of the governor and council to permits to be at liberty, or because it renders the duration of the sentence uncertain, or gives the prison commissioners power to fix the term of imprisonment; but we think that, as the law stood when the offense was committed, the petitioner was entitled to

a deduction for good behavior, and to a permit to be at liberty for the time thus deducted, on such terms as the prison commissioners should fix, and subject to revocation by them, and if sentenced under the statute of 1895, this right might be interfered with to his disadvantage, and that the statute is therefore inoperative ²⁷⁷ and void as an ex post facto law. We do not see how the statute can be construed as merely a measure of prison discipline or regulation, and therefore liable to change from time to time as the legislature may see fit without interfering with any rights on the part of the convict.

We have assumed thus far that the act of 1895 applied to all cases of convicts sentenced to the state prison after it took effect, except such as are sentenced for life or as habitual criminals. But we think that it is doubtful, notwithstanding the generality of the language, whether it should be so construed. It is manifest that convicts sentenced under the statutes of 1895 are not entitled to the benefits of the Public Statutes, chapter 222, section 20. The sentence is intended to be different in character from that referred to in section 20, and the provisions of that section in regard to deduction for good behavior could not be applied to a sentence under the statute of 1895. Section 20 of the Public Statutes, chapter 222, so far as it relates to convicts sentenced to the state prison, is not repealed in terms by that statute. To hold that that statute operates by necessary implication as a repeal of it to that extent, as it would seem that we should be obliged to do if the statute of 1895 is construed to apply to all sentences to state prison after it took effect, whether the offenses occurred before or after it went into operation (*Flaherty v. Thomas*, 12 Allen, 428; *Commonwealth v. McDonough*, 13 Allen, 581), would result in the discharge of all persons who might have been sentenced under it to the state prison for offenses committed before it took effect. On the other hand, by construing it, as we think properly may be done pursuant to the general rule that statutes are to be construed prospectively, to apply to sentences for offenses committed after it took effect, this difficulty will be avoided: See Pub. Stats., c. 3, sec. 3, chs. 1, 2; *Commonwealth v. Sullivan*, 150 Mass. 315; *Commonwealth v. Desmond*, 123 Mass. 407; *King v. Tirrell*, 2 Gray, 331; *North Bridgewater Bank v. Copeland*, 7 Allen, 139; *Gardner v. Lucas*, L. R. 3 App. Cas. 528, 590; *Lambard*, Appellant, 88 Me. 587.

The result is, that the only error being an error in the sentence, and the superior court having jurisdiction to impose such

sentence as should be imposed, the sentence in question, in the opinion of a majority of the court, must be reversed, and the case ²⁷⁸ remanded to that court for sentence according to the law as it was at the time when the offenses were committed before the passage of the Statutes of 1895, chapter 504: *Jacquins v. Commonwealth*, 9 Cush. 279; Pub. Stats., c. 187, sec. 13.

So ordered.

STATUTES—EX POST FACTO LAWS—APPLICATION OF—PROCEDURE.—An *ex post facto* law is one enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage. The term relates to criminal and not to civil proceedings: *State v. Caldwell*, 50 La. Ann. 666, 69 Am. St. Rep. 465, and note, showing that a law changing a remedy is not *ex post facto*. No statute which modifies the rigor of the criminal law is regarded as an *ex post facto* law: *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572. It has been held that a statute, providing that a convict who shall be serving a second term in prison shall be entitled to a less favorable credit for good behavior than first termers, is not *ex post facto* legislation: *In re Miller*, 110 Mich. 676, 64 Am. St. Rep. 376.

STATUTES.—THE UNCONSTITUTIONALITY OF ONE PORTION of a statute cannot defeat other portions unless the nature of the unconstitutional provision is such as to render it of vital importance to the whole statute: Note to *Chicago etc. R. R. Co. v. Jones*, 41 Am. St. Rep. 303.

TELEGRAM NEWSPAPER COMPANY v. COMMONWEALTH

[172 MASSACHUSETTS 294.]

CONTEMPT—CORPORATION—LIABILITY.—An intent may be imputed to a corporation in criminal proceedings, and it may, therefore, be held answerable for a criminal contempt of court.

CONTEMPT—CORPORATION—NEWSPAPER PUBLICATION.—The publication of an article in a newspaper, printed by a corporation and circulated in the place where a trial is had, pending the trial, which concerns the cause on trial and which is calculated to prejudice the jury in the cause and prevent a fair trial, is a criminal contempt of the court trying the cause, for which the corporation may be held answerable.

CONTEMPT—INSTITUTION OF PROCEEDINGS FOR BY COURT—NEWSPAPER PUBLICATIONS.—When it comes, in any manner, to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in a place where the court is held, which are calculated to prevent a fair trial of a cause then on trial before the court, the court, of its own motion, can institute proceedings for contempt.

CONTEMPT—CORPORATION—NEWSPAPER PUBLICATION OF FACTS.—It is a contempt of court for a newspaper, printed by a corporation and circulated in the place where a trial is

had, pending the trial, to publish statements of facts, evidence of which is not competent at the trial, and which is not introduced thereon, if they are so made that it is likely that the presiding justice and the jurors will read them during the trial, and their natural and probable effect will be to improperly influence the justice and the jury in the determination of the cause.

CONTEMPT—CORPORATION—FINE—EXECUTION.—The proper method of collecting a fine imposed upon a corporation for a contempt of court is by a levy of an execution issued by the court.

F. P. Goulding and W. C. Mellish, for the plaintiffs in error.

H. Parker, district attorney, and G. S. Taft, assistant district attorney, for the commonwealth.

295 FIELD, C. J. These are two writs of error, and, although the pleadings may possibly raise issues of fact as well as issues of law, the cases were entered without objection on the part of any of the parties upon the docket of the full court, and each case was heard upon the plea in nullo est erratum. The Telegram Newspaper Company is a Massachusetts corporation, having its usual place of business in Worcester and publishing there a daily newspaper. The Gazette Company is a corporation established under the laws of the state of Maine, having its usual place of business in Worcester, and publishing there a daily newspaper. It is understood that it had complied with the Statutes of 1884, chapter 330, and had made the commissioner of corporations its attorney, upon whom legal process might be served. The record in the cases recites that the corporations respectively appeared in the superior court, with counsel, in obedience to the summons of that court to show cause why they should not be adjudged in contempt for publishing certain articles in their newspapers of the dates of January 13 and 14 respectively of the year 1898, which articles dealt with and discussed the matter of the trial before said court of the action or petition of Silas H. Loring against the town of Holden, and that the corporations appeared and were heard, so that any question of due service of the summons upon the foreign corporation has become immaterial.

At the time of the publication of the articles in the newspapers, the petition of Silas H. Loring against the town of Holden was on trial before the superior court sitting at Worcester, and it was for the assessment of damages suffered by the taking of land of the petitioner for the abolition of a grade crossing of the Fitchburg Railroad Company. The portion of the articles
296 published which the court found was calculated to obstruct

the course of justice in said court and prevent a fair trial of said petition was, after describing the petition of Loring against the town of Holden, the following: "The town offered Loring eighty dollars at the time of the taking, but he demanded two hundred and fifty dollars, and, not getting it, went to law," which appeared in the "Worcester Daily Telegram"; and "The town offered the plaintiff eighty dollars, but he wanted two hundred and fifty dollars," which appeared in the "Worcester Evening Gazette." Whether there is any truth in these statements does not appear. The facts stated, even if they were true, were not admissible in evidence at the trial of the petition before the superior court, and, so far as appears, they were no part of the proceedings at the trial, and, if they were brought to the knowledge of the jurors before they rendered their verdict, were calculated to influence them upon the amount of the damages to be given by their verdict. The newspapers were published and circulated in Worcester, and it was not improbable at the time of publication that the articles would be read by some of the jurors before the trial of the petition was finished.

The record before us, in each case, after setting out the whole of the articles published, and the summons, service, and appearance of the corporation and the hearing, concludes as follows: "When, after hearing all matters and things concerning said publication by said respondents, it appearing to said court that said article was calculated to obstruct the course of justice in said court and prevent a fair trial of said case, and that it was a contempt of said court for said corporation to publish the said article during the said trial, it was therefore ordered by said court that said respondent corporation be adjudged guilty of contempt of said court for said publication of said article, and it was thereupon ordered by said court that said respondent corporation pay a fine of one hundred dollars, and it was further ordered that, if said fine be not paid, within twenty-four hours, an execution be issued against said respondent corporation for the collection of said fine by a levy on its property."

It is contended that a corporation cannot be guilty of a criminal contempt of court, although it may be fined for what is called a civil contempt. It is said that an intent cannot be imputed to a corporation in criminal proceedings. It has been decided in ²⁹⁷ this commonwealth that a corporation may be liable civilly for a libel or a malicious prosecution: *Fogg v.*

Boston etc. R. R. Co., 148 Mass. 513, 12 Am. St. Rep. 583; Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468. We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong. In most of the states of this country corporations may be formed under general laws for the purpose of doing almost any kind of business as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet, if the corporation cannot be punished by a fine, it will escape all criminal liability. The authors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libelous statements is often inadequate. That a corporation may be indicted for a misfeasance as well as for a nonfeasance has been decided in this commonwealth: *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; see *The Queen v. Great North etc. Ry. Co.*, 9 Q. B. 315, 326. A corporation may be indicted for a libel: *State v. Atchison*, 3 Lea, 729, 31 Am. Rep. 663, and note; *Brennan v. Tracy*, 2 Mo. App. 540; *Pharmaceutical Soc. v. London etc. Supply Assn.*, 5 App. Cas. 857, 869, 870; 2 *Bishop's New Criminal Law*, sec. 935; *Newell on Slander and Libel*, 2d ed., 362, 363; *Odgers on Libel and Slander*, 3d ed., 436; *Thompson on Corporations*, secs. 6418 et seq.

The publication of an article in a newspaper which is printed and circulated in the place where a trial is had pending the trial, and which concerns the cause on trial and is calculated to prejudice the jury in the cause and prevent a fair trial, often has been held to be a criminal contempt of the court trying the cause: *O'Shea v. O'Shea*, L. R. 15 P. D. 59; *Ex parte Green*, 7 Times L. R. 411; *Daw v. Eley*, L. R. 7 Eq. 49, 55; *Ramsbotham* 298 v. Senior, L. R. 8 Eq. 575; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *In re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626; *In re Cheeseman*, 49 N. J. L. 115, 137, 60 Am. Rep. 596; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Oswald on Contempt of Court*, 2d ed., 58 et seq.; 7 Am. & Eng. Ency. of Law, 2d ed., 59. If a corporation publishes the article, we see no reason why

it should not be held liable for a criminal contempt: Thompson on Corporations, secs. 6448 et seq.; 7 Am. & Eng. Ency. of Law, 2d ed., 847, and cases cited.

There are no statutes in this commonwealth regulating the proceedings in the trial and punishment of contempt of court. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our declaration of rights": Cartwright's case, 114 Mass. 230, 238. See Tinsley v. Anderson, 171 U. S. 101.

In the present cases, it was not necessary that a formal complaint should first have been made to the court. The contempt, if there was one, was not, strictly speaking, committed in the presence of the court, but it related to a trial then proceeding before the court. In each case a summons to the plaintiffs in error was issued by the court, of its own motion and without complaint made, to show cause why the corporations should not be adjudged in contempt for publishing an article dealing with a matter on trial before the court. When it came in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court, of its own motion, can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court. The proceedings in the present ²⁹⁹ cases after the service of process show that the plaintiffs in error were specifically informed of the nature of the charge against them, and were given a full opportunity to be heard with the aid of counsel.

The most important question is, whether the publication of these articles, under the circumstances stated, could be adjudged a contempt. The articles published were not defamatory, either as regards the presiding justice of the court or the jurors before whom the cause referred to was being tried, or the parties to

the cause. In one case the court discharged the treasurer and manager of the newspaper, and in the other the editor and the publisher, on the ground that they were not shown to be directly responsible for the publications. It is probable, although this does not expressly appear in the papers before us, that the person or persons employed to report for each newspaper the proceedings of the court wrote the articles and caused them to be published. The superior court has not found that there was an intent to influence the trial of the cause referred to on the part of anybody. The articles are objectionable only because they purport to state the amount of money which the town offered to pay the plaintiff, and the amount the plaintiff demanded before the petition was brought. The law encourages attempts to settle or compromise disputes without subjecting the parties to any liability, if the attempts fail, of having any concessions therein made to avoid litigation put in evidence against them in the subsequent litigation: *Upton v. South Reading Branch R. R. Co.*, 8 Cush. 600; *Harrington v. Lincoln*, 4 Gray, 563, 64 Am. Dec. 95; *Gay v. Bates*, 99 Mass. 263; *Draper v. Hatfield*, 124 Mass. 53. We are content to assume that the person or persons who wrote and caused the articles to be published did not know this rule of law, and acted without any intent to pervert the course of justice. As the only intent which can be imputed to the corporations is the intent of its officers or agents, the question is, whether the publication of these articles without any intent to pervert the course of justice can be adjudged a contempt. In *Metropolitan Music Hall Co. v. Lake*, 58 L. J. Ch., N. S., 513, it is said that it must be shown that the articles were published with knowledge of the pending cause, and that appears in the present cases.

³⁰⁰ In *Cartwright's case*, 114 Mass. 230, it is said by the court: "But the jurisdiction and power of the court do not depend upon the question whether the offense might or might not be punished by indictment. . . . 'As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done.' By Taney, C. J., in *Wartman v. Wartman*, Taney, 362, 370." If a person talk with or send a statement to a juror about a cause, during the trial of it, in such a manner that it may cause prejudice or bias in the cause, although the intent with which the person acted may affect the amount of his punishment, he cannot justify his conduct by showing that he had no evil intent, and knew no better.

It was not necessary that the superior court should find that the articles published actually had been read by some of the jurors while trying the cause to which the articles referred. They plainly had been read by the presiding justice during the trial, and it was likely that they had been read by some of the jurors. The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases before a court should be determined on evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the courtroom, and not in the presence of the parties, which may be false, and even if they are true are in law not admissible as evidence.

We cannot say that it appears that the superior court erred in adjudging that the publication of these articles, under the circumstances stated, was a contempt of that court, and it was for that court to determine whether it was necessary to institute proceedings for contempt in order to vindicate its authority to secure the due administration of justice in a cause pending before it. The publications contain statements of facts, evidence of which was not competent at the trial and was not introduced at the trial, and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the justice and the jury in the determination of the cause.

³⁰¹ The proper method of collecting a fine imposed upon a corporation is by a levy of an execution issued by the court: *The King v. Woolf*, 2 Barn. & Ald. 609; 1 Chitty, 583; *Huddleson v. Ruffin*, 6 Ohio St. 604; 1 Chitty on Criminal Law, 2d ed., 811; 1 Bishop's New Criminal Procedure, secs. 1303 et seq.

Judgments affirmed.

CONTEMPT—NEWSPAPER PUBLICATIONS.—A criminal contempt is any act done to obstruct the course of justice or to prejudice the trial of any action or proceeding then pending in court: *State v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep. 90. Any publication relating to a cause pending in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, or on the parties, jurors, witnesses, or counsel, may be punished as a contempt: *Perdval v. State*, 45 Neb. 741, 50 Am. St. Rep. 568, and monographic note thereto on contempts of court by libelous newspaper publications.

CONTEMPT.—COURTS HAVE INHERENT POWER to protect themselves and the administration of justice by the punishment of those who commit a contempt: Note to Percival v. State, 50 Am. St. Rep. 573.

CONTEMPT.—CORPORATIONS can only be punished for contempt through their officers or those acting in aid of such corporations: Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147.

PAIN v. SOCIETE ST. JEAN BAPTISTE.

[172 MASSACHUSETTS, 319.]

ASSOCIATIONS — BENEFIT SOCIETIES — POWER TO AMEND BY-LAWS.—An incorporated beneficiary association has power to so amend its by-laws as to deprive a member of his right to future benefits, under a disability existing at the time of the amendment, where it has, without limitation or restriction, reserved the power to amend its by-laws.

ASSOCIATIONS — BENEFIT SOCIETIES — AMENDMENT OF BY-LAWS APPLIES TO WHAT MEMBERS.—If a by-law of an incorporated beneficiary association, which allows every member a right to five dollars a week if he becomes disabled during a period of not exceeding thirteen weeks in each year, is amended so as to limit his benefits to one dollar per week, for thirteen weeks of each year, during a period of five years, after he has received thirty-nine weeks of sick benefits, such amendment applies to a member who, at the time of its adoption, was under a disability, and had been paid benefits for thirty-nine weeks.

Contract, to recover the amount of benefits alleged to be due to the plaintiff as a member of the defendant society. There was a judgment for the defendant, and the plaintiff appealed.

L. E. Wood and A. G. Weeks, for the plaintiff.

H. A. Dubuque, for the defendant.

³¹⁹ HAMMOND, J. The defendant society is a beneficiary organization, chartered in 1884, under the Public Statutes, chapter 115, and ever since its incorporation the plaintiff has been a member in good standing. In June, 1890, the plaintiff, by reason of sickness, became unable to work, and has so continued to the present time, and ³²⁰ during that time he has received benefits at the rate of five dollars per week for thirteen weeks of each year down to July 7, 1896; and since the latter date he has received benefits at the rate of only one dollar per week for thirteen weeks of each year. This suit is brought to recover the additional four dollars per week for a period of nine weeks.

Whether the plaintiff can recover depends upon the construction and effect of the amendment of the by-laws which was passed on July 7, 1896. If it is applicable to him, he cannot recover, if not, he can.

The by-law of 1893, which, so far as the plaintiff is concerned, was not materially different from that of 1889, under which the plaintiff was receiving aid at the time of the amendment in question, was as follows: "Every member who shall belong to the society for twelve consecutive months, who has paid his dues, contributions, fines, or other sums assessed by vote or by-law of the society, shall have a right to five dollars per week if he becomes unable to work, in consequence of sickness or accident, during a period not exceeding thirteen weeks in each year, beginning from the date of the first application for benefits." And the amendment of July 7, 1896, was as follows: "Provided that when a member has received thirty-nine weeks of sick benefits, or one hundred ninety-five dollars, for the same or a different period of disability, then he shall not hereafter receive more than one dollar per week, instead of five dollars, for thirteen weeks of each year, if his sickness shall so long continue, and that during a period of five years, aggregating sixty-five dollars of benefits. Each year reckons from the date of the first application for benefits. If after that period of five years he is still unable to work, he is then entitled to five dollars a week for thirteen weeks of each year for three years, as at first. This partial suspension of benefits is established so as to allow as much as possible all the members to share more equitably in the disability funds."

The plaintiff concedes that the amendment was duly passed, but in his brief contends, in the first place, that "the defendant society cannot, by such an amendment, under the circumstances of this case, so change its obligation to the plaintiff," because his "originally contingent right to receive benefits as stated became vested upon the happening of the contingency, i. e., his disability ³²¹ to work, June 7, 1890, and from that time no act of the society, by amendment to its by-laws, could divest him of that right"; and in the second place, that even if his rights "were not vested and could be taken away by amendment of the by-laws, such amendment could have no retroactive force," and that "to hold that payments of benefits made before the adoption of the amendment can be applied to benefits accruing under the amendment will make such amendment retroactive in force, and will place the plaintiff in a worse position than

the other members of the society at the time of the adoption of the amendment."

The plaintiff's contention, more briefly expressed, is that the defendant had no power to amend its by-laws so as to affect his rights to future benefits under a disability then existing, and, even if it has such power, this amendment, fairly construed, does not affect such rights. The rights of the plaintiff are determined by the nature of the contract between him and the society, as interpreted by the by-laws under which it was made and in the light of the surrounding circumstances. The general purpose of the society was to give pecuniary aid to its sick or disabled, and, in case of the death of a member, to provide for the relief of his family. The fund for this purpose was to be raised by monthly dues, and, in case of death, by an assessment upon the survivors. Of course, the amount of benefits which the society, with due regard to the interest of the sick as well as that of the other members, could properly pay depended upon many circumstances, such as the number of its members, the actual or relative number of the sick, the promptness with which dues were paid, and others of similar nature; and, as these various circumstances might and probably would change from time to time, it might be regarded not only as prudent, but as necessary, for the successful management of the society, that there should exist the power to make such corresponding changes in the by-laws as the circumstances for the time being might seem to require.

The power to amend the by-laws was reserved, and there is no limit to the reservation. After certain preliminary proceedings, its by-laws could be amended at any time and in any reasonable way. All this the plaintiff well knew from the first, and he was present at the meeting of July 7, 1896, and spoke against the adoption of the amendment.

³²² There being a power of amendment reserved, the contract between the plaintiff and the society was liable to changes with regard to future benefits to which a disabled member might be entitled, as well as in other matters, and the plaintiff had agreed that these changes, duly made in compliance with the rules of the society, should be binding upon him, not as a new contract, but as a part of the old contract and under its provisions.

But the plaintiff contends that there is an implied limitation to this power of amendment, that it cannot be made so as to deprive him of a vested right, and that his right to the benefit

became fixed by his disability, and can never be changed during that disability. But how does the right become fixed? There is no such restriction contained in the words expressing the power of amendment. To thus restrict the power would be to divide the society into two classes, one comprising those like the plaintiff, who could not be affected by any reduction of future benefits, and the second comprising the well members, who would be affected by such reduction. And no matter how many of these preferred pensioners there might be, this society, whose right to graduate payment according to varying circumstances has been reserved so carefully, and in language so general and comprehensive, and which is so plainly necessary to the purposes for which it was incorporated, is powerless to do what might be necessary even to its own existence. There can be no right to future benefits vested in one member more than in another. The right of a sick member to future benefits which becomes vested in the plaintiff at the time of the disability is not a right to receive, so long as such disability continues, the future benefits provided by the by-law existing at the time the disability begins, but simply a right to receive them subject to such changes as may be made by the society, and it is no violation of such a vested right to make the changes at any time. Such a change is not a repudiation of the terms of the contract, but, on the contrary, is in accordance with them.

As was said in *Smith v. Galloway* (1898), 1 Q. B. 71, 77: "Where . . . the original contract . . . provides for alteration of the rules, he is bound by any subsequent alteration that may be made within the power of alteration, whatever the extent of that alteration may be." Such an interpretation of the contract ³²³ seems to be in accordance with the provisions for amendments, and to be the only one reasonably calculated to subserve the interests of all, and to enable the society to accomplish the objects for which it was incorporated.

We are aware that the doctrine herein enunciated is inconsistent with some decisions in other states, but we are satisfied that it is sustained by the better reasoning and the weight of authority: *Smith v. Galloway* (1898), 1 Q. B. 71; *Stohr v. San Francisco Musical Fund Soc.*, 82 Cal. 557; *Poultney v. Bachman*, 31 Hun, 49; *Bowie v. Grand Lodge*, 99 Cal. 392; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362; *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489; 3 L. R. A. 409, and note. *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 449, 46 Am. Rep. 332; *Loeffler v. Modern Woodmen of America*, 100 Wis.

79; Borgards v. Farmers' Ins. Co., 79 Mich. 440; Moore v. Union Fraternal Acc. Assn., 103 Iowa, 424; Carpenter v. Knapp, 101 Iowa, 712; Hughes v. Wisconsin Odd Fellows' etc. Ins. Co., 98 Wis. 292; Catholic Knights of America v. Morrison, 16 R. I. 468.

Of course, no amendment could change the amount of any benefit which under any by-law has passed from a possible to that of a future benefit and has become a debt. The right becomes vested absolutely as the time expires for which the benefit is granted.

As to the second contention of the plaintiff, it is sufficient to say that we think the by-law applies to the case of the plaintiff. The language is broad enough to cover his case. The plaintiff had received more than "thirty-nine weeks of sick benefits," and it was provided that such a person shall "not hereafter receive more than one dollar per week." We have no doubt the construction put upon the amendment by the officers of the society was the one intended and justified by the language.

Judgment affirmed.

MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—RESERVED POWER TO AMEND.—If a mutual benefit association expressly reserves the right to amend its by-laws, and the member makes himself subject to whatever change the association may make in the contract, he is bound by the rules "now in force or which may hereafter be enacted," and must take notice of the existence and effect of such reserved power: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 557, on features of the law specially applicable to mutual or membership life or accident insurance. But while a mutual benefit society has the power to make, alter, abrogate, or amend its by-laws, it cannot so exercise this right that it will operate as a repudiation of its obligations, or to work a forfeiture of rights previously vested in its members: See notes to *Roxbury Lodge v. Hocking*, 64 Am. St. Rep. 600; *Starling v. Supreme Council*, 62 Am. St. Rep. 712.

HARDIMAN v. WHOLLEY.

[172 MASSACHUSETTS, 411.]

ANIMALS—KICK FROM A HORSE UPON THE SIDEWALK—OWNER'S LIABILITY.—A person who has been kicked and injured by a horse temporarily standing upon a sidewalk, where it ought not to be, is entitled to recover therefor without proof that the animal was vicious, and that the owner knew it, particularly where the horse was in an exceptionally nervous condition in consequence of the driver's treatment. In such a case, it is, therefore, correct to refuse to direct a verdict for the defendant.

Tort for personal injuries occasioned to the plaintiff by the kick of a horse. There was a verdict for the plaintiff, and the defendant alleged exceptions.

H. S. Stearns, for the plaintiff.

F. J. Keleher, for the defendant.

411 HOLMES, J. This is an action to recover for personal injuries caused by the kick of a horse. The wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched and were feeding out of feed-bags attached to their heads. There was evidence that this horse had been made nervous by the effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk. He was standing at right angles to it, and, as the plaintiff approached, suddenly whirled round and kicked him. The case is here upon an exception to the refusal to direct a verdict for the defendant. The refusal was right. It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry, but it is not universally true that every horse is entitled to one kick. In England, if the horse is a trespasser and kicks another, the kick will enhance the damages without proof that the animal was vicious and that the owner knew it: *Lee v. 412 Riley*, 18 Com. B., N. S., 722. See *Lyons v. Merrick*, 105 Mass. 71, 76. So, in this commonwealth, going further, it would seem, than the English law, a kick by a horse wrongfully at large upon the highway can be recovered for without proof that it was vicious: *Barnes v. Chapin*, 4 Allen, 444, 81 Am. Dec. 710; *Marsland v. Murray*, 148 Mass. 91, 12 Am. St. Rep. 520; *Dickson v. McCoy*, 39 N. Y. 400, 401. See *Cox v. Burbidge*, 13 Com. B., N. S., 430. The same law naturally would be applied to a horse upon a sidewalk where it ought not to be (see *Mercer v. Corbin*, 117 Ind. 450,

454, 10 Am. St. Rep. 76), and in this case there was evidence of the further fact that the horse was in an exceptionally nervous condition in consequence of the driver's treatment.

Exceptions overruled.

ANIMALS—INJURIES BY—LIABILITY OF OWNER.—The owner of an animal, not naturally vicious, is not answerable for an injury done by it in the place where it belongs, unless it was in fact vicious, and the owner knew it: *Clowdis v. Fresno etc. Irr. Co.*, 118 Cal. 315, 62 Am. St. Rep. 238; but if the animal is wrongfully in the place where it does the mischief, the owner is liable, though he had no notice that it was accustomed to do so before: *Reed v. Southern Exp. Co.*, 95 Ga. 108, 51 Am. St. Rep. 62. A party injured by a vicious horse may recover damages of the owner: *Note to Fake v. Addicks*, 22 Am. St. Rep. 719.

COUPE v. PLATT.

[172 MASSACHUSETTS, 458.]

LANDLORD AND TENANT—DEFECTIVE PREMISES—LANDLORD'S LIABILITY TO TENANT'S GUESTS.—If a landlord maintains outside steps and a platform for the use in common of tenants of different parts of the building, and a visitor to one of the tenants, expressly invited by the tenant to come on a particular day for a particular purpose, is injured by a defect in the platform while passing over it, the landlord is answerable, for the visitor was using the platform in the tenant's right.

Tort for personal injuries. There was a verdict for the plaintiff, and the defendant alleged exceptions.

M. R. Hitch, for the plaintiff.

R. F. Raymond, for the defendant.

459 **KNOWLTON, J.** The question how far a host is liable to his guest for the unsafe condition of his premises, when he is visited upon an invitation, express or implied, merely in a social way, from considerations of friendship or for pleasure, is not raised by this bill of exceptions. The judge assumed in favor of the defendant that the law of this commonwealth is like that of England, where it is held that, in the absence of traps, neither the poor nor the rich are bound to change the conditions in which they are accustomed to live in order to furnish for their friends or guests, recipients of their gratuitous hospitality, safer or more comfortable surroundings than they have for themselves and their families. The English law on this subject was somewhat considered in *Hart v. Cole*, 156 Mass. 475,

478, and in *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, but whether it is to be followed in this commonwealth has never been decided.

The question in this case is different. The defendant was a landlord who maintained outside steps and a platform for the use in common of tenants of different parts of her building. The plaintiff was injured by a defect in the platform while passing over it on a visit to one of the tenants, made on his express invitation to come on a particular day for a particular purpose. The duty of the defendant to keep the platform safe for the tenant, and for those claiming under him, grew out of the contract of hiring. It was a part of the contract that the platform should be kept reasonably safe for the tenant for use in connection with his tenement. The contract impliedly included, not only the tenant himself, but the members of his family, and his servants and agents who might rightfully occupy and use the tenement with him. It included boarders and lodgers, if, in a proper use of the tenement, such persons might be received there by the tenant. It included all persons who, in connection with the use of the tenement by the tenant, might properly pass over the platform under the express authority of the tenant, and in his right. To all such persons, by virtue of her contract with the tenant, the landlord owed the same duty that she owed to the tenant personally, to keep the platform reasonably safe. Whether the tenant would or would not have been liable to the plaintiff for an injury received from an unsafe condition of the tenement which he occupied, he expressly authorized the plaintiff ⁴⁰⁰ to pass over the platform in the exercise of his rights under the contract with the defendant, and the defendant owed the plaintiff the duty which arose from the contract in favor of those who were acting by express authority of the tenant in the tenant's right: *Wilcox v. Zane*, 167 Mass. 302.

Exceptions overruled.

LANDLORD AND TENANT—COMMON STAIRWAY—LANDLORD'S DUTY AND LIABILITY—TENANT'S GUESTS.—If rooms or portions of the same building are let to different tenants, the building having a common stairway for the use of all, the landlord is bound to keep it in reasonable repair, and is liable for a failure to do so, where the tenant's guests, or strangers rightfully on the premises, are injured in consequence of the defective condition of the stairway: *Sawyer v. McGillicuddy*, 81 Me. 318, 10 Am. St. Rep. 260, and note; note to *Lindsey v. Leighton*, 15 Am. St. Rep. 201, notes to *Poor v. Sears*, 26 Am. St. Rep. 278; *Nalley v. Hartford Carpet Co.*, 50 Am. Rep. 53.

HAYDEN v. BARRETT.

[172 MASSACHUSETTS, 472.]

DESCENT—ILLEGITIMATE CHILD AS AN HEIR.—Under the statutory law of Massachusetts, an illegitimate child is the heir of his mother; but at common law he could not be an heir, even of his mother.

WILLS—ILLEGITIMATE CHILD AS AN "HEIR BY BLOOD."—An illegitimate child is the "heir by blood" of his mother within the meaning of a will wherein the term "heirs by blood" is used, where it plainly appears that the testator intended by the use of that term to indicate those persons whose relationship was by some tie of consanguinity; and to exclude all others, such as husband, wife, or adopted children.

Bill in equity, brought by trustees, Hayden and another, against Barrett and others, for instructions as to the construction of the following portion of the will of Sidney B. Morse: "I give, devise, and bequeath all the rest, residue, and remainder of my property and estate, real, personal, and mixed . . . to . . . trustees . . . to pay the net income, rents, and profits thereof to my beloved wife, Mary Ann Morse, during her life, . . . and upon her decease to continue to hold . . . the same during the term of ten years from said time; . . . 5. To pay three-tenths of the income thereof to the children of my brother, George H. Morse, viz., Mary Ann Morse, Fannie E. Barrett, wife of Frank S. Barrett, and Roswell M. Morse, to be equally divided among them, the portion payable to females to be so paid upon their sole receipt and free from the control or interference of any husbands they may have, or, in case one or more of them decease prior to the expiration of said ten years, to pay the income due to such one or more to his or her or their respective heirs by blood, and, at the expiration of said ten years, to transfer, pay over, and convey one of said ten parts so divided as hereinbefore provided to the said Mary Ann Morse, one of said ten parts to the said Fannie E. Barrett, and one of said ten parts to the said Roswell M. Morse; or, in case one or more of them are not then living, to transfer, pay over, and convey such part or portion to his or her or their respective heirs by blood." Mary Ann Morse, the widow of the testator, died on or about July 11, 1895, and his niece, Mary Ann Morse, died on or about November 25, 1895. The respondent, Fannie E. Barrett, was the sister, and the respondent, Horace E. Morse, was the son, of a pre-deceased brother of the niece, Mary Ann Morse. This niece was never married, and the respondent, Ernest L. Morse, was her illegitimate child. She left no father

or mother, and no issue, brother or sister, or descendant of any deceased brother or sister, other than the respondents. It was alleged in the bill that a certain portion of the income in the hands of the trustees was payable by the terms of the fifth clause above-mentioned, and that a like portion of the income to accrue during the period of ten years from the death of the testator's widow, and also of the principal of the trust fund at the expiration of the ten years would be payable to the "heirs by blood" of the niece, Mary Ann Morse, deceased. The justice who heard the bill was of the opinion that Ernest L. Morse was entitled to the portion of the fund in controversy, but, at the request of the other respondents, reported the case for the consideration of the full court.

C. P. Lincoln, for the petitioners.

W. Sullivan, for the respondent, Ernest L. Morse.

E. G. McInnes and C. A. Whittemore, for the other respondents.

474 HAMMOND, J. The single question is, whether under the fifth clause of the tenth item of this will the illegitimate son of Mary Ann Morse takes as her "heir by blood."

By the common law of England and of this commonwealth a bastard in all matters relating to the inheritance of property was nobody's child, and as to such matters his existence was therefore ignored: *Cooley v. Dewey*, 4 Pick. 93, 16 Am. Dec. 326; 2 Dane's Abridgment, 522, and cases therein cited; *Pratt v. Atwood*, 108 Mass. 40.

And accordingly it is also well settled that, in the absence of any language clearly expressing the contrary, all general words in the statutes of distribution, such as "child," "children," "next of kin," and similar words descriptive of classes who are to inherit, do not include illegitimate children: *Kent v. Barker*, 2 Gray, 535, and cases therein cited. And so of similar expressions in a Massachusetts will: *Kent v. Barker*, 2 Gray, 535; *Adams v. Adams*, 154 Mass. 290; *Haraden v. Larrabee*, 113 Mass. 430.

If, therefore, the rights of the illegitimate son of Mary Ann Morse depended upon the common law, the decision must be against him. But for two generations and more it has been the statute law of this commonwealth that an illegitimate child shall be the heir of his mother, and the tendency of legislation

as shown by an amendment to the statute seems to be growing in the direction of change in the common law in this respect more favorable to him. By our statutes Ernest L. Morse was the heir of his mother, and of any maternal ancestor, and, if the mother died intestate, he, being the only child, was her sole heir as to all her property: See Pub. Statutes, c. 125, sec. 3.

By the will the property at her death goes to the "heirs by blood." The illegitimate son, it is true, does not take it by descent from his mother, but, if at all, as the person designated by the will.

⁴⁷⁵ In *Lavery v. Egan*, 143 Mass. 389, 392, where real estate had been devised to a person for life, with contingent remainder to her heirs, it was decided that the husband of the life tenant took as her heir under the Statutes of 1880, chapter 211, section 1, which provides that in certain cases a husband shall take in fee the real estate of his deceased wife to an amount not exceeding five thousand dollars in value. In giving the opinion Mr. Justice Field says: "Although in the case at bar the heirs of . . . [the life tenant] do not take from her by inheritance, but take as persons designated by the will, yet we know of no way of determining the persons intended by the will, except by ascertaining the persons who by law would have inherited the estate from her if she had died seised of it and intestate."

Applying that principle to this case, we have no doubt that, within the meaning of the will as interpreted in the light of the statute, the illegitimate child was the heir of his mother, and it only remains to be considered whether he was her heir "by blood" within the meaning of the will.

The expression "heirs by blood" occurs several times in the will. In the first clause of this tenth item the trustees are directed to pay certain income "to my niece Helen E. Howland, daughter of my said sister Caroline Ware Morris, upon her sole receipt and free from the control or interference of any husband she may have, and in case of her death prior to the expiration of said ten years to pay said balance, if any, to her heirs by blood." And the second clause of said item is as follows: "To pay one-tenth of the income thereof to my niece Caroline E. Dutton upon her sole receipt, free from the control or interference of any husband she may have, and, in case of her death prior to the expiration of said ten years, then to pay the said income to her heirs by blood, and at the expiration of said ten years to transfer, pay over, and convey one of said ten parts

so divided as hereinbefore provided to the said Caroline E. Dutton, or, in case she is not then living, to her heirs by blood."

And the same language is used with reference to the legacies to the other nieces and to his nephew, in the same item of the will. All the way through this item the testator was bearing constantly in mind the husbands of these various nieces, and he desired that there should be no control or interference on the ⁴⁷⁶ part of any such husband during the life of the niece, and then in the same general line of thought uses language which finally excludes the husband from having any share in the property after the decease of the niece.

It is plain, we think, that the testator intended by the use of the term "heirs by blood" to indicate those persons whose relationship was by some tie of consanguinity, and to exclude all others, such as husband, wife, or adopted children. He intended to keep the property in the family and within the tie of consanguinity, but otherwise was content that the law should determine who should be the heir to any niece.

Within the meaning of the will, Ernest L. Morse was the "heir by blood" of his mother.

Decree accordingly.

ILLEGITIMATE CHILD AS AN HEIR.—A bastard could not inherit even from its mother by the common law, but this rule has been changed by statute in some of the states: *McDonald v. Pittsburg etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185, and note. See, also, the monographic note to *Simmons v. Bull*, 56 Am. Dec. 263, on the policy of the ancient common law toward bastards, and rights of, generally.

SPADE v. LYNN AND BOSTON RAILROAD COMPANY.

[172 MASSACHUSETTS, 488.]

RAILROADS—STREET-CARS—RISK ASSUMED BY PASSENGER—EXPELLING DRUNKEN MAN.—A passenger upon a street-car assumes the risk, when he takes passage, of the consequences of a lawful and reasonable act of the conductor in expelling a drunken man from the car.

RAILROADS — STREET-CARS — UNAVOIDABLE ACCIDENT TO PASSENGER IN EJECTING DRUNKEN MAN—RIGHT OF ACTION.—If due care is used in expelling a drunken man from a street-car, an unavoidable battery committed on a passenger's person, during the process, by the conductor's jostling another drunken man, who falls upon the passenger, seems not to be actionable.

RAILROADS—STREET-CARS—DAMAGES FOR FRIGHT CAUSED BY EJECTING DRUNKEN PASSENGER.—If the con-

ductor of a street-car, in ejecting a drunken man therefrom, jostles against another drunken man, who falls upon a lady passenger, and the injury from the fall is slight, though she suffers physical injury from fright caused by the fall and the rest of the occurrences, she can recover, if at all, only for the fright caused by the inadvertent battery, and not for that attributable to the general disturbance.

RAILROADS—STREET-CARS—OBLIGATION TO NERVOUS PASSENGERS.—The obligation of a street railway company toward a passenger cannot be increased simply by his notifying the conductor that he has unstable nerves.

ASSAULT—BATTERY UPON PERSON OF UNSTABLE NERVES—DAMAGES.—If a street-car conductor commits an unjustifiable battery upon the person of a lady passenger, who has unstable nerves, the company must answer for the actual consequences of the wrong to her as she is, and the damages cannot be cut down by showing that the effect would have been less upon a normal person.

Tort, for personal injuries sustained by the plaintiff, while a passenger on the defendant's car, through the company's alleged negligence. There was a verdict for the plaintiff, and the defendant alleged exceptions.

S. L. Whipple and W. R. Sears, for the plaintiff.

C. K. Cobb, for the defendant.

⁴⁸⁸ **HOLMES, J.** This is an action for personal injuries which already has been before the court: *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393. At the second trial the evidence was that the defendant's conductor in removing a drunken man from a car jostled another drunken man who was standing in front of the plaintiff, and threw him upon her. The fall upon her seems to have been a trifling matter, taken by itself, but the fright caused by that and the rest of the occurrences in the car resulted in physical injury. The case comes up again upon exceptions.

The judge was asked to direct a verdict for the defendant. We find some difficulty in seeing upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man ⁴⁸⁹ off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen when she got into the car. We all know that, if people are standing in the passageway of a street-car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage.

It is a question which deserves more discussion than it has received, whether a man is answerable for an injury inflicted upon an innocent stranger knowingly, or with sufficient notice of the danger, if the injury is an unavoidable incident of lawful self protection. It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders: *Gilbert v. Stone*, Aley, 35, Style, 72; *Scott v. Shepard*, 2 W. Black, 892, 896; *Cooley on Torts*, 115; see *McLeod v. Jones*, 105 Mass. 403, 405, 7 Am. Rep. 539; *Miller v. Horton*, 152 Mass. 540, 547, 23 Am. St. Rep. 850; *Pierce v. Cunard S. S. Co.*, 153 Mass. 87, 90; *Whalley v. Lancashire etc. Ry.*, 13 Q. B. Div. 131. And compare the rule as to duress in contracts and conveyances: *Fairbanks v. Snow*, 145 Mass. 153, 155, 1 Am. St. Rep. 446. On the other hand, the contrary has been intimated in a case of shooting in self-defense, the injury to the third person being treated on the footing of accident: *Morris v. Platt*, 32 Conn. 75, 84. See *Bacon's Maxims*, Reg. V. & VI.; *Addison on Torts*, 6th ed., 380, 383. And the right to pull down a house when the destruction is necessary to stop a fire, as it usually is stated, looks the same way: See *Taylor v. Plymouth*, 8 Met. 462, 465; *American Print Works v. Lawrence*, 23 N. J. L. 590, 613, 57 Am. Dec. 420. The alleged immunity for the necessary destruction of a building suggests that perhaps the question cannot be answered in general terms, and that one possible distinction may be found where the parties have a common interest, even though the act done in furtherance of it may cause more harm than good to the plaintiff. Perhaps it would be unsafe to find any countenance to such a distinction in decisions as to the rights of landowners or officials in diking against water when it appears as a common enemy: *The King v. Sewer Commrs.*, 8 Barn. & C. 355; *Nield v. London etc. Ry.*, L. R. 10 Ex. 4. Compare *Whalley v. Lancashire etc. Ry.*, 13 Q. B. Div. 131. But when we go a step further, and take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's right, and its duty to the plaintiff and the other passengers, no passenger can complain of any consequence which the performance of that duty necessarily entails. We assume, for present purposes, that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect of the construction and management of their vehicles; but if that care is shown, probably the injury must be

regarded as an inevitable accident. As to whether there was any negligence in the manner of expelling the drunken man, or otherwise, we will go no further than to say that it has not been pointed out to us. We need not decide the question, as there must be a new trial for another reason.

A ruling was asked to the effect that the plaintiff could recover only for the pain and fright caused by the contact with her person and not for such mental disturbance and injury as were caused by other acts of the conductor and the general disturbance in the car. This was refused, and the jury were instructed that, if there was a physical injury and accompanied by it there was fright which operated to her injury in body or mind, she could recover for the damage caused by the fright, and the jury were told that they might take all that happened as one whole. The effect of the refusal and the instructions appears to us to have been that, when once a battery of the plaintiff was proved, the defendant became or might be found liable for all the consequences of the disturbance in the car and of the plaintiff's fright, however caused. We do not so understand the law. By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages, if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant's conduct, but for consequences of the defendant's wrong to the plaintiff. The wrong to the plaintiff, if any, began with the battery, and it is for the consequences of the battery only ⁴⁹¹ that the defendant is liable, not for all the consequences of the drunken man's presence in the car or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating. But it seems quite possible in this case that the plaintiff's trouble was due in substance to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark without which she would not have collapsed. It is unnecessary to express an opinion whether the evidence in this case warranted the latter feeling.

We may add a word with reference to a suggestion made on behalf of the plaintiff, and having some bearing upon the eighth instruction asked and the instructions given. It is argued that, because the conductor had known the plaintiff for several years, the defendant's obligations to her were increased, if the jury believed that she was a particularly sensitive person and that

the conductor must have known it. We regard such an argument even to the jury as wholly inadmissible. Ordinary street-cars must be run with reference to ordinary susceptibilities, and the liability of their proprietors cannot be increased simply by a passenger's notifying the conductor that he has unstable nerves. In this case it will be left to the jury to say whether there was anything that called for special attention to the plaintiff beyond what was due to other women. Nothing is pointed out to us as a basis for such increased obligation except the conductor's acquaintance with the plaintiff, and that laid no foundation for it. We should add, however, to avoid being misunderstood and with reference to the plaintiff's tenth request, that if the defendant's servant did commit an unjustifiable battery on the plaintiff's person, the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person: *Braithwaite v. Hall*, 168 Mass. 38, 40. The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another.

Exceptions sustained.

RAILROADS—EXPULSION FROM STREET-CARS—LIABILITY FOR NEGLIGENT EXECUTION OF LAWFUL ACT.—An obnoxious passenger may be lawfully expelled from a street-car: *Vinton v. Middlesex R. R. Co.*, 11 Allen, 304, 87 Am. Dec. 714; *Lemont v. Washington etc. R. R. Co.*, 1 Mackey, 180, 47 Am. Rep. 238; but a railroad company is answerable where its employé performs an act incident to his employment so unskillfully, negligently, recklessly, or wantonly, as to injure persons who are without fault: *Toledo etc. R. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489.

DAMAGES FOR FRIGHT OCCASIONED BY NEGLIGENCE. In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright: *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393. If there is no immediate personal injury to a plaintiff from the negligence of another, she cannot recover for injury occasioned by her fright arising from the negligent act, though in consequence of the fright she became unconscious, and had a miscarriage: *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604. On the other hand, that railroad companies are answerable in damages for mental suffering or physical injury arising from fright caused by their negligence, see *Mack v. South Bound R. R. Co.*, 52 S. C. 323, 68 Am. St. Rep. 913.

ASSAULT AND BATTERY—UNINTENTIONAL INJURY TO THIRD PERSON.—An intention to do harm is of the essence of assault, hence a defendant is not answerable for an accidental casualty, but, if he intends to harm a person by his act, and unintentionally injures a third person, he is liable for an assault and battery: *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81, and note.

GRAFTON NATIONAL BANK v. WING. GRAFTON
SAVINGS BANK v. WING.

[172 MASSACHUSETTS, 513.]

NEGOTIABLE INSTRUMENTS—WHAT WORDS DO NOT BIND ONE AS AN INDORSER.—The words, "Estate of Jona. D. Wheeler, Henry F. Wing, Executor," indorsed on a promissory note, mean "Estate of Wheeler by Wing," and do not bind Wing by contract. Wing's estate is not, therefore, liable upon such an indorsement.

Contract upon promissory notes made by the Wheeler Cotton Mills. Henry F. Wing, the defendant's intestate, was the treasurer of the Wheeler Cotton Mills, and also executor of Jonathan D. Wheeler's will. The plaintiff in each case had received a part payment under a compromise agreement with the Wheeler Cotton Mills, and the plaintiffs sought to hold Henry F. Wing's estate on the ground that he was personally liable. The notes were again given in renewal of former notes, similarly indorsed, and which had been originally indorsed by Jonathan D. Wheeler, in his lifetime. The defendant, Oliver M. Wing, requested the judge to rule that the actions could not be maintained, but he refused to do so and found for the plaintiff in each case. The defendant alleged exceptions.

F. P. Goulding and W. C. Mellish, for the plaintiffs.

J. B. Scott and T. H. Gage, Jr., for the defendant.

515 HOLMES, J. These are two actions of contract against the administrator of the estate of Henry F. Wing, seeking to hold him upon two indorsements made by Henry F. Wing as executor of the will of Jonathan D. Wheeler. The indorsements were in the following form: "Estate of Jona. D. Wheeler, Henry F. Wing, Executor."

A majority of the court are of opinion that these words mean "Estate of Wheeler by Wing," and therefore that at least they failed to bind Wing by contract. It is quite true that the law does not know the estate of a dead man as a contractor, and that, unless the fact that these indorsements were the renewal of indorsements by Wheeler in his lifetime makes a difference, they did not bind the estate. But that merely shows that the indorsements were made by Wing under a mistake of law, as the testimony also proves to have been a fact. But the presence of

Wing's name upon the paper and his failure to bind his supposed principal are not enough to make the contract his own: *Jefts v. York*, 4 Cush. 371, 50 Am. Dec. 791; 10 Cush. 392, 395, 396; *Abbey v. Chase*, 6 Cush. 54, 56, 57; *Taylor v. Shelton*, 30 Conn. 122. If a man does not purport to be a party to negotiable paper, he is not a party to it: See, further, 1 Daniel on Negotiable Instruments, 4th ed., secs. 306-308; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240. It is true that it is suggested by Mr. Daniel that in such cases an ambiguous expression may be interpreted to bind the agent, but neither that suggestion nor a presumption that the agent knew the law can pervert words from their meaning if the meaning is plain. The so-called presumption is a requirement, not a presumption of fact, and has no bearing or weight upon the construction of instruments.

We are of opinion that the court should have ruled that the defendant was not liable.

Exceptions sustained.

NEGOTIABLE INSTRUMENTS.—INDORSING AS AGENT is equivalent to a declaration that the indorser will not be personally liable: *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 550.

VAN NORMAN *v.* GORDON.

[172 MASSACHUSETTS, 576.]

JUDGMENT, THOUGH CONFESSED UNDER WARRANT OF ATTORNEY, IS ENTITLED TO "FAITH AND CREDIT" IN ANOTHER STATE.—A judgment of a court of one state is entitled to full faith and credit in other states where the court which rendered it had jurisdiction to render such a judgment. If it had, then the fact that it is a judgment by confession, under a warrant of attorney, is immaterial. Such judgments, when rendered by courts having jurisdiction of the cause and the parties, have all the qualities, incidents, and attributes of other judgments.

COURTS—PRESUMPTION AS TO JURISDICTION.—A county court, with a clerk and seal, is a court of record. Hence, if it enters a judgment upon a warrant of attorney to confess judgment, upon which an action is brought in another state, such court will there be presumed to have been a court of general jurisdiction.

JUDGMENT OF SISTER STATE—ACTION UPON—PRESUMPTIONS.—In an action upon a judgment of a sister state, entered upon a warrant of attorney to confess judgment, the presumption is, that the court had jurisdiction to enter it, and that the proceedings were regular and according to the laws of that state.

JUDGMENT CONFESSED UNDER WARRANT OF ATTORNEY—ILLUSTRATION—"FAITH AND CREDIT" IN AN-

OTHER STATE.—If a person signs a promissory note, executing, at the same time, a warrant of attorney to confess judgment, and a judgment of a court of record in an action upon the note is entered, under such warrant by the confession of an attorney of such court, who was requested to appear by the attorney named in the warrant, such judgment is entitled to full faith and credit in another state, if an action is brought upon it, though such appearance in the former state was really in the plaintiff's interest, where there is no charge of fraud, no appearance of irregularity, and what was done in confessing judgment came within the terms of the warrant of attorney.

Contract upon a judgment rendered by a county court of the state of Wisconsin. The action was brought by the plaintiff, Van Norman, against the defendant, Gordon. The plaintiff had recovered a judgment against the defendant, in Wisconsin, upon a promissory note. At the time that the defendant made the note, he executed a warrant of attorney in which he appointed E. H. Bottum, "or any attorney of any court of record," his attorney to waive service of process and confess judgment in favor of Van Norman upon the note. Annexed to the declaration in this case was a copy of the record of the court in which the judgment was entered, which set out the "complaint," reciting the making and delivery of the note, and demanding judgment for the amount due, by "Winkler, Flanders, Smith, Bottum, and Vilas, plaintiff's attorneys." The answer showed that Ogden & Hunter, defendant's attorneys, appeared, waived service, and confessed judgment for the defendant. An execution was returned unsatisfied, and the papers were authenticated by the clerk of the court, with the seal affixed. In Massachusetts, the superior court rendered a judgment for the defendant, and, on appeal, it was agreed that the defendant signed the note, on which suit was brought, in Wisconsin; that he also signed the warrant of attorney to confess judgment, on which judgment was confessed, in Wisconsin; that at the time he signed the note and warrant of attorney, he was in and was a resident of that state; that no personal service was made on the defendant in the Wisconsin suit; that the defendant never authorized Ogden and Hunter to appear or act for him in the suit except as they may have been authorized so to do by the warrant of attorney to confess judgment; that the judgment was entered as set forth in the declaration and the record thereto annexed, and had never been vacated or satisfied in any part; and that the said Ogden and Hunter were attorneys of a court of record.

C. H. Sprague, for the plaintiff.

G. B. Upham, for the defendant.

578 MORTON, J. The question is, whether the judgment which the plaintiff seeks to enforce is entitled to full faith and credit. The answer depends on whether the court which rendered it had jurisdiction to render such a judgment: *Board of Public Works v. Columbia College*, 17 Wall. 521. If it had, then the fact that it is a judgment by confession under a warrant of attorney is immaterial. Such judgments, when rendered by courts having jurisdiction of the cause and the parties, have all the qualities, incidents, and attributes of other judgments: *Teel v. Yost*, 128 N. Y. 387; see *Henry v. Estes*, 127 Mass. 474.

It does not appear from the facts that are agreed whether the laws of Wisconsin in force at the time authorized the entry of **579** judgments pursuant to powers of attorney to confess judgment, or if so, under what circumstances, or whether the court which rendered the judgment was a court of record or of general jurisdiction, or, if that is material, whether the defendant was a resident of Wisconsin when the judgment was rendered and the proceedings were instituted. No objection has been made, however, in respect to these matters, and the copy of the record, which has been submitted to us, shows that the court was a county court, with a clerk and seal, and was therefore a court of record, and may be presumed to have been a court of general jurisdiction: *Knapp v. Abell*, 10 Allen, 485, 489; *Pringle v. Woolworth*, 90 N. Y. 502.

And in view of the further considerations that every presumption is to be made in favor of the regularity of the proceedings, that it is not now contended that the court had not jurisdiction to enter judgment pursuant to a warrant of attorney to confess judgment, and that such proceedings are well known at common law and in many states, we think that it may also be presumed that the court had jurisdiction to enter judgment upon a warrant of attorney to confess judgment, and that the proceedings were regular, and according to the laws of Wisconsin: *McMahon v. Eagle Life Assn.*, 169 Mass. 539, 61 Am. St. Rep. 306, and cases cited; *Wright v. Andrews*, 130 Mass. 149; *Stockwell v. McCracken*, 109 Mass. 84; *Bissell v. Wheelock*, 11 Cush. 277; *Galpin v. Page*, 18 Wall. 350.

The attorneys who appeared and acted for the defendant

never were authorized to appear for him and confess judgment, except as they were authorized to do so by the warrant of attorney. It is agreed that they were attorneys of a court of record—in Wisconsin, we assume. We assume also that they were requested to appear by the attorney named in the warrant, or his firm, and that their appearance was really in the plaintiff's interest. That naturally would be so, and must have been expected when the power of attorney was given. There is no charge of fraud, or that judgment was entered for more than was due, or before the note was due, which would have been contrary to the power of attorney. The record shows that judgment was not entered till seventeen or eighteen months after the note was due. The note and warrant of attorney were ⁵⁸⁰ both signed in Wisconsin, where the defendant, and, as we infer, the plaintiff resided at the time, and the note was payable in Wisconsin, where the plaintiff has his place of business, if not his home.

What was done in confessing judgment came within the terms of the warrant of attorney. Unless, therefore, the warrant of attorney purported to give an authority which it did not, or was for some reason invalid, we see no ground on which the judgment can be called in question. Assuming that we could refuse full faith to the judgment if we thought that there was an error of law in it (see *contra*, *Laing v. Rigney*, 160 U. S. 531, *Carpenter v. Strange*, 141 U. S. 87, and *Richards v. Barlow*, 140 Mass. 218), we find nothing which would justify such a conclusion. The warrant well might be held valid in Wisconsin, though adjudged invalid in another state. According to Mr. Dicey and Mr. Freeman, however, a warrant of attorney may be so drawn as to authorize a confession of judgment in a foreign state: *Dicey on Conflict of Laws*, 377; *Freeman on Judgments*, sec. 545.

Lord Blackburn went so far in one case as to suggest that: "If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them": *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161. He was overruled, however, in *Sirdar Gurdyal Singh v. Rajah of Faridkote* (1894), App. Cas. 670, 685, 686.

In *Richards v. Barlow*, 140 Mass. 218, no objection seems to have been taken because the warrant authorized an appearance "by any attorney of any court of record"; See, also, *First Nat. Bank v. Garland*, 109 Mich. 515, 63 Am. St. Rep. 597; *Teel v.*

Yost, 128 N. Y. 387. And in *Pirie v. Stern*, 97 Wis. 150, 65 Am. St. Rep. 103, it was held that a power authorizing a confession of judgment "in any court of record" could be executed in any state in the Union, disapproving, as does also the court in Michigan in *First Nat. Bank v. Garland*, 109 Mich. 515, 63 Am. St. Rep. 597, the cases in Ohio and Tennessee on which the defendant relies. In *Blanck v. Medley*, 63 Ill. App. 211, it was held that a warrant of attorney authorizing "any attorney of any court of record" to confess judgment could be executed by an attorney in partnership with the attorney who signed the declaration for the holder of the note: See, also, *Mikeska v. Blum*, 63 Tex. 44.

⁵⁸¹ We think, therefore, that the judgment must be regarded as rendered by consent of the defendant, that it was such a judgment as the court which rendered it had jurisdiction to render, and that it is entitled to full faith and credit.

Judgment for the plaintiff.

JUDGMENT BY CONFESSION—WARRANT OF ATTORNEY—"FAITH AND CREDIT."—A judgment on a promissory note, entered in one state by confession under a warrant of attorney, is valid in a sister state: *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 42 Am. St. Rep. 282; note to *Pirie v. Stern*, 65 Am. St. Rep. 106. Under the constitution of the United States, the judgment of a sister state must be accorded in this state the same "faith and credit" which it has in the state where it was rendered: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872. That there may be a confession of judgment in one state upon a power of attorney executed in another, see *Pirie v. Stern*, 97 Wis. 150, 65 Am. St. Rep. 103.

JUDGMENTS OF SISTER STATES—PRESUMPTION OF JURISDICTION.—In the absence of contradictory evidence there is a legal presumption in favor of the jurisdiction of a court of record of another state which has assumed jurisdiction over the subject matter in controversy between parties residing there: Note to *Kelley v. Kelley*, 42 Am. St. Rep. 398.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

DORR v. LIFE INSURANCE CLEARING COMPANY.

[71 MINNESOTA, 38.]

CORPORATIONS—STATUTORY LIEN ON STOCK.—When, by general law, a lien is given to a corporation upon the stock of a stockholder in the corporation for his indebtedness to it, that lien is valid and enforceable against all the world, unless it has been waived, surrendered, or lost in some sufficient manner.

CORPORATIONS—ASSIGNMENT OF STOCK—EFFECT ON LIEN OF THE CORPORATION.—An assignment or sale of corporation stock, to a person ignorant of a statutory lien thereon held by the corporation, will not discharge the lien.

CORPORATIONS—NOTICE—KNOWLEDGE OF PRESIDENT.—A corporation cannot be charged with the knowledge of its president, when such knowledge was obtained before he became president, or when he is acting in his own interest and behalf.

William G. White, for the appellant.

Munn & Thygeson, for the respondent.

39 COLLINS, J. This was an action to establish a lien claimed by plaintiff upon twenty-nine shares of defendant's capital stock, the certificates therefor having been executed, issued, and delivered to one Russell R. Dorr as an original subscriber for stock shares in defendant corporation. It was plaintiff's claim that Dorr had pledged these stock shares to her to secure an indebtedness for money borrowed with which to pay for them when issued. The defendant corporation asserted a lien upon the shares, alleged to be superior and paramount, for and on account of an indebtedness due to it from Dorr arising out of his failure to pay for his stock shares. The cause was tried below with that of *St. Paul Nat. Bank v. Life*

Ins. etc. Co., 71 Minn. 123, in which the same kind of relief was demanded, and is closely connected with it, although the facts here are much less complicated.

From the findings it appears that, prior to the incorporation of defendant, Dorr borrowed three thousand dollars of plaintiff for the purpose of paying for stock shares then subscribed for, agreeing to secure the loan by pledging the shares so paid for as collateral security. After the incorporation he made an arrangement with the defendant by which it agreed to accept his notes, secured by real estate mortgages, in part or in full payment for these and other stock shares, but, to evade the statutory regulation requiring payment in cash, defendant, by its board of directors, voted a nominal loan to Dorr for the amount of his notes. This part of the transaction was in form, but not in fact, a loan to Dorr. Defendant then accepted the notes and mortgages and issued and delivered to Dorr the certificates, three in number, representing the twenty-nine shares of stock, and he, in accordance with his agreement with plaintiff, assigned and delivered the same to her as collateral security.

Until shortly prior to the commencement of this action, defendant corporation had no notice or knowledge of this transaction between plaintiff and Dorr. Later, under some arrangement for reducing defendant's capital stock, Dorr returned these three certificates for surrender and cancellation. In lieu thereof another ⁴⁰ certificate for a less number of shares was executed by defendant to Dorr, and issued and delivered to one William R. Dorr, acting as agent for plaintiff and Russell R. Dorr. This certificate was accepted in lieu of the others. At the time of this transaction defendant had no notice or knowledge of plaintiff's interest in these stock shares, or that the same had been assigned to her, or that William R. Dorr was acting as her agent in the matter. Dorr defaulted in the payment of his notes secured by the mortgages, and this action was the immediate result of defendant's attempt to foreclose its alleged lien by a sale of the stock shares at public auction.

Four points are made in the brief of counsel for plaintiff (appellant): 1. That the stock in question was "full paid," whatever that may mean; 2. That as between plaintiff and defendant the latter had allowed the former to believe that the stock shares were fully paid for, and is now estopped from asserting a claim that they were not; 3. That, if defendant ever had any lien upon these stock shares, it has been waived as to plaintiff;

and 4. That as Dorr, who became president of defendant corporation at its organization, had knowledge of the entire affair with plaintiff, his knowledge must be imputed to defendant, and the findings in respect to its want of notice or knowledge until just prior to the commencement of this action were therefore unsupported by the evidence.

We need not take up these points in detail. The General Statutes of 1894, section 2799, provides that the stock of a corporation of this character shall be transferable only on the books of the corporation in such form as the directors prescribe, and that the "corporation shall at all times have a lien upon the stock or property of its members invested therein, for all the debts due from them to such corporation, which may be enforced" by sale.

There was no controversy over the fact that Dorr had not paid his notes, and, with this admitted, it is obvious that he was indebted to the defendant, for which indebtedness it had the right to enforce the statutory lien. The statute is notice to everyone of the right of a corporation to a superior and paramount lien on stock shares for the indebtedness of a stockholder. Its operation ⁴¹ is very comprehensive. The assignee or pledgee of the stock takes it subject to the statutory right of the corporation. He cannot acquire any greater rights than had the stockholder himself.

When, by general law, a lien is given to a corporation upon the stock of a stockholder in the corporation for his indebtedness to it, that lien is valid and enforceable against all the world, unless it has been waived, surrendered, or lost in some sufficient manner. An assignment or sale of the stock to a person ignorant of the lien will not discharge it. The authorities seem to be uniform upon this subject: *Cook on Stock and Stockholders*, sec. 532; 23 *Am. & Eng. Ency. of Law*, 695, and cases cited in notes. See, also *Schmidt v. Hennepin etc. Co.*, 35 *Minn.* 511.

There was no waiver, or surrender, or loss of this lien shown in this case. The findings as to defendant's want or lack of notice or knowledge of the transaction between plaintiff and Dorr were fully sustained by the evidence, and, with these findings unassailable, there is nothing left of the contention of counsel as to the remaining points.

Even if it should be held that notice or knowledge of the transaction between Dorr and plaintiff, whereby he secured the

loan upon a promise to pledge the stock shares subscribed as collateral, could be material or effectual as to defendant corporation, there are two good reasons why such notice or knowledge cannot be imputed to it: 1. When the loan was made and the money obtained, Dorr was not its president, for it had not then been organized; 2. Had he been president at the time, he was acting in his own interest and behalf. Under such circumstances the defendant corporation could not be charged with the knowledge of its presiding officer: *Bang v. Brett*, 62 Minn. 4.

Order affirmed.

CORPORATIONS—LIEN ON STOCK—ASSIGNMENT TO THIRD PARTY.—If a lien on stock is given by statute for indebtedness to the corporation, owing by a stockholder, a transfer of the stock to a person ignorant of the lien does not discharge it, nor authorize the purchaser to demand and receive a transfer of it so discharged: See monographic note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 394. A lien merely created by a by-law is void as against an innocent holder for value: *Bank of Atchison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396.

CORPORATIONS—NOTICE TO PRESIDENT.—Notice to the president of a corporation is not notice to the corporation, where the president is acting in his own interests and against those of the corporation: *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125, and note; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, and note. See *Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788.

MERRILL v. SECURITY TRUST COMPANY.

[71 MINNESOTA, 61.]

DOWER—ASSIGNMENT FOR BENEFIT OF CREDITORS. Where a married man executes, under the insolvent law, an assignment of all his nonexempt property for the benefit of creditors (his wife not joining), the assignee's title to the real estate assigned is not subject to the wife's inchoate right.

DOWER, STATUTORY—WHEN SUBJECT TO PAYMENT OF HUSBAND'S DEBTS.—In Minnesota, the widow's statutory one-third in the real estate of her husband is "subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate."

Edmund S. Durment, for the appellant.

M. L. Countryman, for the respondent.

⁶³ MITCHELL, J. In 1893 D. D. Merrill (a married man), being insolvent, executed to the defendant pursuant to the in-

solvent law of 1881 (Gen. Stats. 1894, secs. 4240-4252) an assignment of all his nonexempt property for the benefit of his creditors. Included in the assigned property was a large amount of real estate, which the defendant still holds for the purposes of the trust. Mrs. Merrill did not join with her husband in the execution of the assignment. Merrill died in 1896, and the plaintiff, his widow, brings this action against the defendant for a partition of the real estate, claiming that, under the statute, she is now the absolute owner of one undivided third of it, free from the payment of any part of the debts of her deceased husband. Aside from certain question of practice, not necessary to be considered, the only question presented by this appeal is whether this claim on part of the widow is correct.

Owing to their early professional education, lawyers may be liable to enter upon the consideration of this question with certain preconceived impressions, derived from the doctrines relating to common-law dower (which was not subject to the payment of the husband's debts), and to fail to give due weight to the fact that with us the widow's statutory one-third in the real estate of her husband is "subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate."

Some things which this court has said, if not decided, will show that our minds have not always been entirely free from these preconceived impressions. In view of the plain provisions of the statute ⁶⁴ there can be no question that, when the husband's estate is administered in the probate court, the widow's third in his real estate is subject to the payment of its just proportion of his debts. Sales of real estate by the personal representative for the payment of debts are not subject to the widow's right, but convey a complete title. All that the widow gets in such a case is a third of the real estate which is left after the debts are paid.

Every reason for this applies with equal or greater force where the husband's entire nonexempt estate is administered by the district court in bankruptcy. In the latter case, although not physically dead, he is financially so. If, after his discharge, he acquires property, it is by virtue of what may be termed a "new financial birth," as of the date of his discharge. In bankruptcy, as in probate, his entire nonexempt estate is in court for purposes of administration and distribution; and in the one case as in the other all his creditors are or may become parties to the proceedings. The insolvent law contains

no provision that the assignment by the husband shall be subject to the wife's inchoate right in his real estate; and, in our opinion, the provisions of statute requiring the wife's assent in writing to conveyances by the husband, in order to bar her inchoate interest in the property conveyed, have no application to a general assignment under the insolvency law for the benefit of creditors. It would result in an anomalous state of things if the wife is held to have greater rights when her husband's estate is administered in bankruptcy than when it is administered in probate.

Take the present case for example. If plaintiff's contention is correct, she is entitled to an absolute one-third of her husband's estate, regardless of the amount of his debts; and yet, if he had happened to die without making this assignment, and the estate had been administered by the probate court, she would, in all probability, have been entitled to nothing except the homestead, if there was one. Any such rule would be attended with grave practical evils, and would tend to defeat to a great extent the purposes of the insolvency law. It is a well known fact that property sold subject to the wife's inchoate interest will not usually bring anything like its full value. The result would be that the land would be disposed ⁶⁵ of without either debtor or creditors getting the benefit of its full value, and that, too, without the wife deriving anything but a very remote and contingent advantage from the sacrifice of the property.

We are referred to *Dayton v. Corser*, 51 Minn. 406, as being in conflict with these views. In that case we held that the sale of the land of one spouse, on execution founded upon a judgment against the owner, did not divest the inchoate interest of the other spouse. Whatever might be said of the decision if the question was *res integra*, we are not disposed to overrule or modify it. But that case and the present one are not at all analogous. In the case of sale on execution, the estate of the debtor is not in court for administration. No property is affected except the particular tract or tracts sold. Neither are his creditors in court or parties to the proceeding. There is no way of determining who his creditors are, or how much his debts amount to. Hence there is no way by which it can be determined what would be the just proportion of his debts to which the wife's inchoate interest in the particular tract should be subjected.

Goodwin v. Kumm, 43 Minn. 403, is also relied on by plaintiff's counsel. That case was rightly decided on the ground

that the husband cannot, by his covenants of title against the inchoate interest of his wife in the deed of conveyance, create by their breach a debt which will indirectly have the effect of divesting the wife's inchoate interest in the property conveyed. If the opinion had put the decision of the case on that ground alone, it would have been entirely sound; but it proceeded obiter to announce certain other propositions, some of which are probably incorrect.

The order overruling the demurrer is reversed.

DOWER—NOT LIABLE FOR HUSBAND'S DEBTS AT COMMON LAW—STATUTORY CHANGES.—A sale made by an administrator under an order of court of his intestate's lands to pay ordinary unsecured debts proved against his estate does not bar the widow of the intestate from dower: *Motley v. Motley*, 53 Neb. 375, 68 Am. St. Rep. 608. Dower, provided by law in behalf of the widow, is paramount to all conveyances, contracts, encumbrances, debts, or liabilities of the husband executed or incurred by him during coverture: *Higginbotham v. Cornwell*, 8 Gratt. 83, 56 Am. Dec. 130; *Combs v. Young*, 4 Terg. 218, 26 Am. Dec. 225. In some states the common-law rule has been changed. For example, in North Carolina, the sale of land under execution divests the defendant's estate, and bars the dower of his wife, though the deed be not executed until after the assignment of the dower: *Den v. Frew*, 3 Dev. 3, 22 Am. Dec. 708, and note thereto.

WOLFORD v. COOK.

[71 MINNESOTA, 77.]

LIMITATIONS OF ACTIONS.—PART PAYMENT OF A DEBT. in order to take a case out of the statute, must be made voluntarily by the debtor sought to be charged with the effect of it, or by some one authorized by him to make a new promise on his behalf.

LIMITATIONS OF ACTIONS.—PART PAYMENT—CREDITOR AS AGENT OF DEBTOR.—A creditor cannot be made the agent of the debtor to such an extent as to make an act done by him operate as a new promise to himself.

LIMITATIONS OF ACTIONS.—PART PAYMENT—PROCEEDS OF COLLATERAL SECURITIES.—Where collateral security has been given by a debtor to his creditor, under an agreement that, if necessary, the creditor should sell the collateral and apply the proceeds on his debt, the subsequent sale of such collateral and the application of the proceeds on the debt, to which the debtor made no objection, will not operate as a part payment at the date of the receipt of such proceeds, so as to interrupt the operation of the statute of limitations.

LIMITATIONS OF ACTIONS.—PART PAYMENT—GIVING ADDITIONAL SECURITY.—If a debtor, in the absence of any circumstances tending to rebut the inference of an implied promise to pay the whole debt, gives new and additional security for

the payment of the debt, the proceeds of which when collected to be applied on the debt, it will operate as a part payment sufficient to take it out of the statute.

LIMITATIONS OF ACTIONS—PART PAYMENT—PAYMENT IN GOODS.—It is not necessary, for the purpose of interrupting the statute, that the part payment should be in actual money. A payment in goods may be sufficient for that purpose.

Armstrong Taylor, for the appellants.

Jacob H. Cook and Welch, Hayne & Hubachek, for the respondent.

⁷⁸ MITCHELL, J. This action was brought in February, 1897, by the legatees under the will of Peter Wolford, deceased, to recover a balance claimed to be due on a promissory note dated March 9, 1889, and payable seven months after date. It is conceded that the note was barred by the statute of limitations, unless the running of the statute had been interrupted by partial payments. The plaintiffs rely upon two alleged payments as having that effect. These we will consider separately.

1. Contemporaneously with the execution of the note in suit, and as part of the same transaction, the defendant assigned to Peter Wolford and the plaintiffs, as collateral security, certain notes and mortgages against third parties under an agreement that, if Wolford or the plaintiffs had to foreclose the mortgages, they should bid in the mortgaged premises for the full amounts due thereon, and, if no redemption was made from the sales within the year, they should then credit defendant on his note with the amounts for which the property was sold. These collateral mortgages were foreclosed, and the premises bid in by Wolford and the plaintiffs on February 17, 1890, and one year thereafter Wolford applied the amount on defendant's note, and subsequently sent him a statement showing that credit and the balance due on the note, to which the defendant never made any objection.

The principle upon which part payment of a debt will take a case out of the statute is that such payment amounts to an acknowledgment of the existence of the debt, from which the law implies a new promise to pay the balance. To have that effect, the payment must be voluntarily made by the debtor in person who is sought to be charged with the effect of it, or by some one authorized by him to make a new promise on his behalf. It has been held, or at least intimated, in some cases, that a sale of collaterals made within a reasonable time after they

are deposited with the creditor, and the application of the proceeds on the debt, will operate as a part payment at the date of the receipt of such proceeds, so as to interrupt ⁷⁹ the operation of the statute. This doctrine rests upon the mistaken idea that the creditor is thereby made the agent of the debtor for the collection or sale of the collaterals, ignoring the fact that the creditor cannot be made the agent of the debtor to such an extent as to make an act done by him operate as a new promise to himself, without which element a payment can never operate to remove the bar of the statute: Wood on Limitation of Actions, sec. 101.

Wolford's right to receive the proceeds of the collateral mortgages, and apply them in part payment of defendant's note, was acquired under and by virtue of the contract made at the time the collaterals were transferred to him. His subsequent exercise of that right was not a voluntary payment made by the defendant from which a promise to pay the residue can be inferred. The defendant had done nothing since he transferred the collaterals to Wolford in March, 1889. The fact that he made no objection when informed by Wolford that he had applied the proceeds of these collaterals on his note could not take the case out of the statute. He had no reason to object, and, if he had done so, it would have been futile. Wolford had merely exercised a contract right which he acquired in 1889. Defendant's passive acquiescence in the exercise of that right constituted neither a voluntary payment as of that date, nor a new promise in writing to pay the balance of the debt: *Harper v. Fairley*, 53 N. Y. 442; *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60; *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568.

Some of the cases may be misleading, for the reason that they seem to lay some stress on the fact that the debtor never knew of, and consequently never assented to, the application by the creditor of the proceeds of the collaterals. If the debtor had any option in the matter, or any power to object effectively to the application, there would be some force in the suggestion that his assent to it amounted to a voluntary payment by him as of that date. But this cannot be so where the creditor is merely exercising an absolute legal right under the original contract.

2. At the time the note in suit was executed, and as part of the same transaction, the defendant, as additional collateral security for its payment, procured to be conveyed certain im-

proved real estate to Peter Wolford. While this conveyance was in form an ⁸⁰ absolute deed, it is conceded that it was in fact merely a mortgage, and created between the parties the relation of mortgagor and mortgagee. The defendant remained in possession of the property, and in the receipt of the rents, until in 1893, when the plaintiffs claimed and took possession, collected the rents, and applied them upon the note in suit.

The evidence bearing on this branch of the case is very indefinite and unsatisfactory, and very little attention is paid to it in the briefs of counsel. There is evidence tending to show that Wolford and the plaintiffs claimed the right to collect the rents and apply the proceeds on the note by virtue of some agreement between them and the defendant, made contemporaneously with the execution of the mortgage. If so, the agreement was not enforceable: *Cullen v. Minnesota Loan etc. Co.*, 60 Minn. 6. But there is also evidence tending to show that the defendant voluntarily let the plaintiffs into possession for the purpose of collecting the rents and applying them on the note, thus placing them in the position of mortgagee in possession. This would amount to the giving of new and additional security for the payment of the debt. It is not necessary, for the purpose of interrupting the statute, that the part payment should be in actual money. A payment in goods may be sufficient for that purpose. So, the indorsement and delivery by the debtor of the note of a third party as collateral security for his indebtedness to another, the proceeds when collected to be applied on the debt, may operate as a payment sufficient to take it out of the statute: *Wood on Limitation of Actions*, sec. 112.

Hence, if the defendant voluntarily and in the absence of any circumstances tending to rebut the inference of an implied promise to pay the whole debt, turned over the rents and profits of the mortgaged premises to Wolford and the plaintiffs, to be by them applied, when collected, on the note in suit, this would, in law, amount to such a part payment as would interrupt the statute. As already suggested, circumstances might rebut the inference of any implied promise to pay the balance of the debt, as, for example, if the defendant was merely submitting to the exercise by Wolford and the plaintiffs of an enforceable legal right acquired under a prior contract, or if Wolford and the plaintiffs were asserting and ⁸¹ claiming such a right, and the defendant yielded to the claim honestly believing that they had such a right, to which he was legally compelled to submit. The

evidence on this branch of the case should have been submitted to the jury under proper instructions. On the first branch of the case there was nothing to submit to them.

Order reversed.

LIMITATIONS OF ACTIONS—WHAT CONSTITUTES PART PAYMENT.—Part payment, in order to arrest the running of the statute of limitations, is a voluntary payment, made by the debtor himself, or by some one authorized by him to make the payment: *Moffitt v. Carr*, 48 Neb. 403, 58 Am. St. Rep. 696.

LIMITATIONS OF ACTIONS—PART PAYMENT—ASSIGNEE AS AGENT.—The payment of a dividend by the assignee of an insolvent debtor will not take the debt out of the statute of limitations as against the debtor: *Whitney v. Chambers*, 17 Neb. 90, 52 Am. Rep. 398, and monographic note thereto.

LIMITATIONS OF ACTIONS—PART PAYMENT—GIVING ADDITIONAL SECURITY—PROCEEDS OF COLLATERAL SECURITY.—The delivery of the promissory note to a third person is sufficient to suspend the operation of the statute of limitations from the date of delivery, but not from the date of actual payment of the note: *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60. Where the maker of a note has placed personal property in the hands of the payee as collateral security, the payee's application thereof, without notice to the debtor and his assent, will not constitute a payment warranting the inference of a new promise: *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568.

MOFFETT v. PARKER.

[71 MINNESOTA, 139.]

MORTGAGES — RIGHTS OF ASSIGNEE — EQUITIES OF THIRD PARTIES.—A mortgage has none of the privileges of negotiable paper, but is a mere chose in action. Hence, an assignee thereof takes it subject to any defense that exists between the original parties, unless they are equitably estopped by their acts, or otherwise, from asserting it as against the assignee; but the assignee does not take it subject to any equities of third parties of which he has no notice.

MORTGAGES — DEFENSE AGAINST MORTGAGEE.—A mortgagor in a real estate mortgage, given without consideration to defraud creditors, may enjoin its foreclosure by the mortgagee.

MORTGAGE GIVEN WITHOUT CONSIDERATION TO DEFRAUD CREDITORS—RIGHTS OF ASSIGNEE.—Where a mortgage is given without consideration, to defraud creditors, the dishonest mortgagor is equitably estopped from claiming that there was no consideration for the mortgage, as against a purchaser in good faith, for value, and without notice.

ESTOPPEL.—Where one, by his willful or fraudulent conduct, causes another to believe in the existence of certain facts, who is thereby induced to act on the belief, and does so in good faith, and parts with his money in reliance thereon, the former is estopped from denying the existence of such facts.

James I. Best and Eugene N. Best, for the appellants.

Albert G. Broker, for the respondents.

140 **START C. J.** Action by plaintiffs, as judgment creditors of the defendants Samson and Hannah R. Parker, to have canceled the mortgages hereinafter referred to, with the records thereof, given by them upon the premises described in the complaint. Judgment (from which the plaintiffs appealed) was rendered in their favor, for the relief prayed, upon condition that they first pay to the defendant Broker, as trustee of the Merchants' National Bank of Wadena, \$3,500 and interest.

The facts as found by the trial court are: On July 8, 1896, the plaintiffs, upon an indebtedness which accrued December 15, 1893, **141** recovered and docketed a judgment against the Parkers, each of whom is insolvent, for \$1,239.11, upon which an execution has been returned wholly unsatisfied. On December 27, 1895, James J. Lee held a mortgage on the premises, which was duly recorded, for \$800, made by the Parkers to him, which they then paid; but, for the purpose of continuing the mortgage on the premises with the intent of hindering and delaying the plaintiffs in the collection of their demand, they caused the mortgage to be assigned by Lee to their son, Warren E. Parker, and the assignment was recorded January 2, 1896. On February 26, 1896, the Parkers also gave to Warren E. Parker a mortgage on the premises for \$4,000, and on the same day they caused it to be duly recorded. This mortgage was executed without any adequate consideration, to secure a pretended indebtedness of \$4,000, and with intent on the part of the mortgagors and the mortgagee to defraud creditors, and particularly the plaintiffs, by creating an apparent lien on the premises.

Before the plaintiffs recovered their judgment, and on May 22, 1896, Warren E. Parker borrowed \$3,500 from the Merchants' National Bank of Wadena, and, for the purpose of procuring and securing such loan, duly assigned the two mortgages to the defendant Broker, to be held in trust for the bank, as security for the money so borrowed. This assignment was duly recorded May 29, 1896. Neither Broker nor the bank then had any knowledge or notice of the frauds in connection with the mortgages, or either of them, but they took such assignment and received the mortgages as such collateral security in good faith and without notice.

1. The correctness of the findings of fact is not challenged,

except in two particulars. It is claimed: 1. That the trial court erred in not finding that the \$4,000 mortgage was given without any consideration. The finding is, that it was given without any adequate consideration, which is, we assume for the purposes of this appeal, the equivalent of a finding that the mortgage was made without any consideration; and 2. That the finding to the effect Broker, as the trustee of the bank, was in fact a purchaser of the mortgages in good faith for value, without notice, is not supported by the evidence. The burden of establishing the fact was upon Broker and the bank. The point is made that the evidence ¹⁴² received in support of the finding was not admissible under the pleadings. No such objection was made at the trial, but simply the objection that the evidence was immaterial, which was insufficient to call the court's attention to the pleadings. Besides, the record shows no exception to the ruling of the court. We have considered the evidence, and hold it sufficient to support the finding in question.

2. The remaining assignments of error are to the effect that the trial court erred in its conclusion of law that Broker, for the bank, was entitled to a lien on the premises by virtue of the assignment of the mortgages to him, to the extent of \$3,500 and interest, which was superior to the lien of the plaintiffs' judgment; or, in other words, that the judgment, in so far as it requires the payment by the plaintiffs to the bank of the amount of its loan, as a condition of having the mortgages canceled as to it, is not supported by the facts found.

The real question is, then, whether the bank is equitably entitled to hold as against the plaintiffs the \$4,000 mortgage to secure its loan of \$3,500. If it is, then it is wholly immaterial whether it is entitled so to hold the \$800 mortgage; for, if it be conceded that it is not, still the fact remains that the \$4,000 mortgage exceeds the bank's claim, and the cancellation of the \$800 mortgage would not affect its lien for the full amount of its claim, or subordinate its lien to that of the plaintiffs' judgment. It would seem, however, that the \$800 mortgage, having been assigned and delivered to Warren E. Parker at the request of the mortgagors, for the purpose of continuing it as a mortgage on the premises to defraud creditors, should be treated as a mortgage made to him without consideration, to defraud creditors. Be this as it may, the conclusion we have reached renders it unnecessary to refer further to the \$800 mortgage.

It is the settled law of this state that a mortgage has none

of the privileges of negotiable paper, but is a mere chose in action; hence an assignee thereof takes it subject to any defense that exists between the original parties, unless they are equitably estopped by their acts, or otherwise, from asserting it as against the assignee. But it does not follow from this proposition that the plaintiffs ¹⁴³ have any equity superior to the bank to have the mortgage canceled, for it is equally well settled, at least in this state, that the assignee of a mere chose in action or of past due negotiable paper, takes it subject to the equities of the original parties thereto, but not as to any equities of third parties of which he has no notice: *Newton v. Newton*, 46 Minn. 33; *Plymouth Cordage Co. v. Seymour*, 67 Minn. 311.

Now, the plaintiffs had the equitable right to subject the premises in question to the payment of their claim against the mortgagors, and to have the mortgage canceled as against the mortgagee. But this was an equity external to the mortgage. They were not parties to it, and the bank parted with its money in reliance upon the mortgage and the assignment thereof in good faith, without any notice of the equity of the plaintiffs. Therefore the equity of the former as between it and the plaintiffs is the superior. But the plaintiffs' equity against the mortgagors and mortgagee is clear, and if the bank cannot retain and enforce the \$4,000 mortgage, to the extent of the loan against the mortgagors, the plaintiffs are also entitled to have the mortgage canceled as to the bank as well, for, if the bank has no equity as against the mortgagors which it can enforce, then the cancellation of the mortgage cannot injure it.

This brings us to the pivotal question in this case: Has the bank the equitable right to enforce this mortgage to the extent of its loan against the mortgagors. It must be conceded that, if the mortgagee had attempted to enforce this mortgage, the mortgagors could defeat his action by showing want of consideration, although the mortgage was executed for the purpose of defrauding their creditors. It was held in *Bickford v. Johnson*, 36 Minn. 123, that a mortgagee in a chattel mortgage given without consideration, for the purpose of defrauding the creditors of the mortgagor, could not enforce his mortgage. The case of *Stevens v. McMillin*, 37 Minn. 509, seems to introduce a discordant note, and to hold to the contrary; but the matter was fully and finally considered in *Devlin v. Quigg*, 44 Minn. 534, 20 Am. St. Rep. 592, and the conclusion reached that a mortgagor in a real estate mortgage given without consideration, to defraud creditors, might ¹⁴⁴ enjoin its foreclosure by the mort-

gagee. In so deciding the court did not disregard the rule that courts will not exert their powers to extricate parties from the consequences of their dishonesty. On the contrary, the decision rests upon the principle that parties to a contract will not be permitted to show its dishonest character as between themselves. Neither will be allowed to prove his own turpitude for the purpose of cheating the other. So when the mortgagor, in an action by the mortgagee to foreclose the mortgage, establishes the fact that there was no consideration for the mortgage, the mortgagee cannot be permitted to rebut this defense by showing that the mortgage was made and received for the purpose of defrauding creditors.

The reasons why a fraudulent mortgagee may not enforce a mortgage given without consideration to defraud creditors do not apply to a bona fide assignee without notice, who has parted with his money for the mortgage. It will not do to group the general rules we have referred to in the form of a syllogism, and reason thus: The assignee of a mortgage takes it subject to any defense existing between the original parties. The mortgagor who gives a mortgage without consideration, to defraud his creditors, may plead and prove, as against the mortgagee, the want of consideration as a defense. Therefore the assignee (the bank in this case) cannot enforce this mortgage against the mortgagors for any amount.

The defect in this logic is, that it is not always true that the assignee of a mortgage takes it subject to defenses between the original parties. The conduct and acts of a mortgagor may be such as equitably to estop him from asserting a defense against the assignee which would be open to him as against the mortgagee. Where one, by his willful or fraudulent conduct, causes another to believe in the existence of certain facts, who is thereby induced to act on the belief, and does so in good faith, and parts with his money in reliance thereon, the former is estopped from denying the existence of such facts: *Tousley v. Board of Education*, 39 Minn. 419.

Now, in this case, if the bank brings an action against the mortgagors to enforce this mortgage, if they answer that the mortgage was given without consideration, the bank will not be in the position ¹⁴⁵ of the fraudulent mortgagee, who would not be permitted to show the real transaction, because it would be alleging and proving his own turpitude, but the bank may, in rebuttal, allege and prove the facts as to the making of the mortgage and its purchase of it, as found by the trial court.

The whole dishonest transaction may be given in evidence. Such facts show, upon the plainest principles of morals and equity—they are identical—that the mortgagors are equitably estopped from claiming, as against the bank, that there was no consideration for the mortgage given to defraud their creditors.

We are not dealing with a case where the maker of a note or mortgage has, through no fault of his own, been induced to give it without any consideration. In such a case, he is not estopped, by a recital under his hand and seal, that the instrument was given for a valuable consideration, to show that such was not the fact. But we are dealing with a case where the mortgagors, for the dishonest purpose of defrauding their creditors, willfully and fraudulently represented, under their hands and seals, that they owed the mortgagee \$4,000, and that they gave him a lien on their real estate to secure its payment. And, further, for the purpose of making it appear to the world that such indebtedness and lien in fact did exist, they, as the trial court found, themselves caused this representation to be spread upon the public records, there to remain a continuing declaration that it was an honest mortgage. They also delivered this solemn and formal representation to the mortgagee, for the purpose of furthering their design of defrauding their creditors. For this dishonest purpose they put it in his power to cheat honest men. The bank, in reliance upon these representations, the mortgage and its record, in good faith and without notice parted with \$3,500.

Shall the honest assignee of this mortgage or the dishonest mortgagors suffer this loss? Our answer is, the mortgagors. It would be a reproach to the administration of justice to hold otherwise. They are estopped as against the assignee from asserting the defense that the mortgage was executed without consideration, in order to defraud their creditors. In so holding, we do not ¹⁴⁶ impinge upon the rule that a mortgage is a non-negotiable chose in action.

So far as we are advised, there are but few adjudged cases upon this question. We have not been referred to any opposed to the conclusion reached. The case of *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453, was one where an action was brought against the mortgagor, mortgagee, and assignee to set aside a real estate mortgage, on the ground that it was given to defraud the plaintiff, and without consideration. It did not appear that there was any negotiable note connected with the mortgage, and it was treated as a chose in action, and held that the assignee took

the mortgage subject to all equities existing between the mortgagor and the mortgagee, but not as to any equities of the plaintiff; and, further, that the mortgagor could not set up, as against the assignee in good faith, that the mortgage was given to defraud creditors, and without consideration. Christiancy, J., speaking for the court, said, at page 404: "He [the mortgagor], at least, cannot be heard to complain if an assignee has chosen to act upon the presumption that it was executed for an honest purpose, and by an honest man. To hold otherwise would be to encourage fraud, rather than to suppress it."

The case cited is not directly in point, as it was also disposed of upon the further ground that it was intended by the mortgagor that the mortgagee should sell the mortgage. See, also, the case of *Sleeper v. Chapman*, 121 Mass. 404, wherein it was held that the assignee, without notice, of a mortgage given in fraud of creditors, acquires a good title against the creditors of the mortgagor. The bank, having the equitable right to enforce the mortgage against the mortgagors to the extent of its loan, and its equity being superior to that of the plaintiffs to have it set aside, it follows that the judgment must be affirmed.

So ordered.

MORTGAGES — RIGHTS OF ASSIGNEE — EQUITIES OF THIRD PARTIES AGAINST ASSIGNOR.—The general rule, as stated broadly, is that the assignee of a mortgage takes it subject to all equities in favor of the mortgagor existing at the time of the assignment: *Horstman v. Gerker*, 49 Pa. St. 282, 88 Am. Dec. 501. But this general rule is subject to the exception noted in the principal case, that the mortgagor may be estopped from setting up any equities that may exist in his favor: *Wilson v. Ott*, 173 Pa. St. 253, 51 Am. St. Rep. 767. But an assignee, without notice, does not take the mortgage subject to any equity of a third person against the assignor: *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475. And where the mortgage is accompanied by a negotiable note, which is assigned before maturity and for a valuable consideration, the assignee takes the securities free of any equities existing between the original parties of which he had no notice: *Williams v. Keyes*, 90 Mich. 290, 30 Am. St. Rep. 438; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638. But see the note to *James v. Morey*, 14 Am. Dec. 514.

ESTOPPEL.—For the requisite to constitute an estoppel, see *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *Sweeney v. Pratt*, 70 Conn. 274, 66 Am. St. Rep. 101.

SCANLAN v. GRIMMER.

[71 MINNESOTA, 351.]

NAMES, CONTRACT UNDER ASSUMED-IDENTITY.—A person, not engaged in a fraudulent or criminal purpose, may enter into a contract under any name he may choose to assume. All that the law looks to is the identity of the individual, and when that is established the act will be binding upon him and upon others.

NAMES, CONTRACT UNDER ASSUMED-KNOWLEDGE OF OTHER PARTY.—A contract entered into under an assumed name is binding, even though the other parties thereto were induced to believe that the assumed name was the person's real name, and though such parties were opposed to entering into a transaction with the person himself.

MORTGAGES--USURY--GRANTEE ASSUMING MORTGAGE--ESTOPPEL.—A vendee who accepts a conveyance of land subject to a mortgage thereon, and containing a covenant whereby such vendee assumes and agrees to pay said mortgage, is estopped from asserting that the obligation secured thereby is usurious.

S. L. Pierce, for the appellant.

J. A. Sawyer, for the respondent.

354 COLLINS, J. Action to determine adverse claims to real property, the actual purpose being to set aside and cancel a mortgage thereon of date January 12, 1894, purporting to have been executed and delivered to one John B. Alexander, as mortgagee, to have been assigned to one Maggie A. Henningsen by Sylvester Davis, as attorney in fact ³⁵⁵ for said Alexander, and subsequently assigned by Henningsen to defendant Grimmer, who alone answered in the action.

The primary and principal question in the case grows out of the fact that the money loaned to plaintiff's husband, Martin Scanlan, who then owned the land, belonged to Davis himself, and was furnished by him for the express purpose of making the loan, under an agreement entered into by him with one Gleason, who was found by the court to have been his agent in the matter, that, for all of the necessary purposes of the transaction, Davis should assume the name of John B. Alexander, that the money should be loaned to Scanlan as belonging to a man bearing that name, that the note should be made so payable, and that John B. Alexander should be named as mortgagee in the mortgage. The agreement was carried out; the note and mortgage were so written; Davis delivered the amount of the loan, two thousand dollars, to Gleason in Scanlan's presence; and the former paid out for the latter, and upon his authority, in liquidating existing liens on the land, between eighteen hundred dollars and

nineteen hundred dollars. It appears that Gleason kept the balance of the money for himself. The note and mortgage were delivered to Davis, and by him the mortgage was put upon record.

Subsequently Scanlan and his wife sold, and by warranty deed conveyed, the premises to a son, Joseph Francis. The latter soon afterward sold, and by warranty deed conveyed, the same to another son, Patrick, and then he sold, and by warranty deed conveyed, the land to this plaintiff. Each of these deeds was in the usual form, but to the covenant against encumbrances in each was added this language: "Except a mortgage for two thousand dollars to John B. Alexander, dated January 12, 1894, which mortgage and interest the party of the second part assumes and agrees to pay."

In October, 1894, Davis, pretending to act by virtue of a power of attorney and as the constituent of John B. Alexander, in writing assigned the note and mortgage to Mrs. Henningsen. The fact was that Davis' son signed the name of John B. Alexander to the writing, purporting to be the power, at the instigation of his father and Gleason; the latter, as a notary public, pretending to take and certifying ³⁵⁶ to Alexander's acknowledgment thereof. Of this Mrs. Henningsen was ignorant. She was a bona fide purchaser, and paid to Davis two thousand dollars in cash for the note and mortgage. She then sold, and in writing assigned, the same, with a covenant as to the amount due thereon, to the defendant Grimmer, who was also a purchaser in good faith, paying two thousand dollars in cash. Scanlan paid one year's interest upon the note—to whom does not appear.

On its findings, in accordance with the above statement of facts, the court below held, as conclusions of law, that the note and mortgage were usurious, but that by reason of the assumption clauses in the warranty deeds, whereby title to the premises was vested in this plaintiff, the defense of usury was waived, and that the latter was estopped from interposing such defense. It also held that the mortgage, power of attorney, and assignments were each absolutely null and void, and that plaintiff was entitled to the relief demanded in her complaint as against defendant Grimmer.

As stated at the outset, the main question here is the one covered by the conclusion that the mortgage was and is void because Davis, for the purposes of the transaction and for some undisclosed reason, assumed the name of Alexander as mort-

gagee. The court seems to have been of the opinion that because the mortgagors were misinformed and misled, and intended to mortgage their land to Alexander, and not to Davis, the instrument was absolutely void for want of necessary parties, and therefore defendant Grimmer, an innocent purchaser, who parted with his money in good faith, is to be deprived of his security, and probably made to lose his investment. Any rule or doctrine which would result in such a gross injustice would have to be exceedingly well settled before we could indorse and adopt it.

Fortunately, we are not confronted with such a case. The court below failed to apply the true and well-settled rule to the facts. It overlooked the distinction between the assumed name of a person actually identified and a wholly fictitious name without an identified person behind it. The evidence, as well as the findings of fact, conclusively shows that Davis assumed the name of Alexander, and identified him as the real mortgagee under the assumed name. In assuming this name in a business transaction, Davis was ³⁵⁷ not engaged in a fraudulent or criminal purpose, and he could bind himself as well as other persons by its adoption and use. In *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, it was held that, although a grantor of land executed a conveyance thereof under an assumed name, such conveyance would be effectual to convey title if the grantor was in fact the true owner; and that in such a case evidence outside the instrument could be introduced to identify the actual grantor. While not so stated, it is obvious that this conclusion was founded upon the established rule of law that in business matters a contract or obligation may be entered into by a person by any name he may choose to assume. All that the law looks to is the identity of the individual, and, when that is ascertained and clearly established, the act will be binding upon him and upon others: *Bell v. Sun Printing etc. Co.*, 10 Jones & S. 567; *In re Snook*, 2 Hilt, 566. See, also, *Toole v. Peterson*, 31 N. C. 180; *Thomas v. Wyatt*, 31 Mo. 188, 77 Am. Dec. 640.

There is nothing in the contention of counsel, evidently quite potent with the court below, that the mortgagors were induced to believe that they were dealing with a person named Alexander and that, according to their own testimony, they were opposed to entering into such a transaction with Davis, of whom they had heard "bad reports": See *Fellowes v. Lord Gwydyr*, 1 Sim. 63, 1 Russ. & M. 83. Their contract with the mortgagee was with him and his assigns, as is usual in such transactions. They expressly authorized an assignment of this instrument. Had the

mortgagee actually borne the name of Alexander, he could have at once assigned to Davis without consulting the mortgagors. The point is too far-fetched and fanciful to be of value. The trial court erred when finding that the mortgage lacked a mortgagee, and when holding it to be void.

There was no error in the conclusion of the trial court that the defense of usury was unavailing to plaintiff. In each of the deeds whereby title to the mortgaged property was transferred from plaintiff's husband to herself was the assumption clause heretofore quoted. The land was conveyed to plaintiff, as it had been to her immediate and remote grantors, subject to the mortgage for two thousand dollars, which mortgage, with interest, she as grantee assumed and agreed ³⁵⁸ to pay. This is a covenant on which an action is ordinarily maintainable against a vendee: *Follansbee v. Johnson*, 28 Minn. 311.

Of course, we do not decide that the defense of usury could not be successfully interposed in such an action, for the question is not in this case. A vendee who accepts a conveyance of land subject to a mortgage thereon, and containing a covenant whereby such vendee assumes and agrees to pay said mortgage, is estopped from asserting that the obligation secured thereby is usurious. The whole title of such vendee rests upon the conveyance, and the continued existence of the mortgage, as an encumbrance, forms a part of it. The conveyance is evidence of title, and when proven, as such evidence, the existing mortgage and the assumption thereof is also proven. A grantee cannot be permitted to claim title "both under and against the same deed; to insist upon its efficacy to confer a benefit, and repudiate a burden with which it has qualified it; to affirm a part and reject a part." The proposition above laid down in respect to the estoppel is more than supported by the authorities: *Calkins v. Copley*, 29 Minn. 471; *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Pidgeon v. Trustees of Schools*, 44 Ill. 501; *Gibson v. Lyon*, 115 U. S. 439. See, also, 27 Am. & Eng. Ency. of Law, 953, notes 1, 2.

Judgment reversed, and new trial ordered.

NAMES—CONTRACTS UNDER ASSUMED.—Where a party adopts a name, he will be holden by contracts executed in such name, whether the name so assumed be an artificial one or the proper name of a living person: *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225. If the true owner conveys property by any name, the conveyance as between the grantor and grantee will transfer the title: *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347, and note thereto. A chattel mortgage executed by a party under a fictitious name is valid: *Alexander v. Graves*, 25 Neb. 453, 13 Am. St. Rep. 501.

MORTGAGES—USURY.—AN ASSIGNEE OF THE MORTGAGOR, standing in legal privity with the mortgagor, may avoid the contract for an excess of usury, and is entitled to the proper reduction on the mortgage, to enable him to perform his contract, and by payment to relieve the mortgaged premises from the encumbrance, in favor of a purchaser from the mortgagor: *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594.

COOPER v. HAYWARD.

[71 MINNESOTA, 374.]

EXECUTORS AND ADMINISTRATORS—CONTRACTS—ACTION ON PROMISSORY NOTE FOR BENEFIT OF ANOTHER.—Where a promissory note is taken in the name of one party for the benefit of another, the administrator of the payee may maintain an action on it.

ESTATES OF DECEDENTS—ASSETS DISPOSED OF BY SOLE HEIR—RECOVERY BY ADMINISTRATOR.—Where, before an administrator is appointed of an estate, against which there are no debts proved or to be proved, a sole heir and distributee makes an equitable assignment of all her interest and the interest of the estate in certain personal property, such assignment is binding upon an administrator subsequently appointed on the petition of such sole heir and distributee, and he cannot recover the property disposed of.

RELEASE—IGNORANCE OF CLAIM.—A party cannot release a claim of which he had no knowledge, and of the existence of which he had always been fraudulently kept in ignorance.

M. D. Taylor, for the appellants.

G. W. Stewart, for the respondent.

375 CANTY, J. This is the second appeal in this action: See *Cooper v. Hayward*, 67 Minn. 92. After the decision on the former appeal, the case was again tried in the court below, and, at the close of the trial, the judge ordered a verdict for plaintiff for the amount of the note and interest. From an order denying a new trial defendant appeals.

It appears by the evidence that in 1887 defendant's brother, W. H. Hayward, and his father, J. E. Hayward, were associated together as partners in the lumber business, under the firm name of W. H. Hayward & Co.; that the brother had at that time but little property of his own; that the father furnished all the capital for the business, and had besides a considerable amount of individual property; and that the brother was manager of both the partnership business and most of the father's individual business, and had authority to draw checks on the partnership

funds in the bank, and also to draw checks in his father's name on the individual funds of the latter in the bank. At this time defendant was financially embarrassed, and was about to lose some of his property on chattel mortgages.

The evidence tends to prove that there had been some trouble between him and his father, and he did not want the latter to know that his property was mortgaged. So he applied to his mother for ³⁷⁶ assistance, and she requested her son, W. H. Hayward, to draw checks on said partnership funds in payment of defendant's debts. W. H. Hayward at first refused to do this, as he feared the father would discover what he had done. Thereupon she told him that she would be responsible for it, and would stand between him and his father, if the latter discovered it. Then W. H. Hayward drew the checks in payment of defendant's debts, either wholly on the partnership funds, or partly on those funds and partly on the individual funds of the father, and, when these debts were thus paid, defendant executed to W. H. Hayward the note in suit for the amount of the payments. W. H. Hayward died in 1890, and the father in 1895. The evidence also tends to prove that the father, during his lifetime, never knew or discovered that any of his funds, or the partnership funds, went to pay the debts of the defendant, or that the latter had executed the note to his brother. On these facts, it was held on the former appeal that there was a good consideration for the note.

The note being taken in the name of W. H. Hayward, he would, under section 5158 of the General Statutes of 1894, have a right to maintain an action on it, even though he had no beneficial interest in it at all. Under section 4297 of the General Statutes of 1894, a trust estate does not, on the death of the trustee, descend to his heirs or pass to his personal representatives, as it did at common law, but the execution of the trust vests in the district court, and it appoints a new trustee. But we cannot hold that this statute applies to such a case as this, where no trust appears on the face of the instrument, and it is merely a case of a promissory note being taken in the name of one party for the benefit of another. Then the administrator of the payee of the note can maintain the action whether the amount recovered will be held for the estate of W. H. Hayward, or the estate of his father, or partly for each estate. This is what was held on the former appeal.

But some additional facts have since come into the case which have been set out in plaintiff's supplemental complaint. It is

alleged in this complaint, and admitted in the answer to it, that the widow of W. H. Hayward is his sole heir and distributee. It is alleged, and appears by the evidence given on the last trial, that after his death, and before an administrator of his estate was appointed ³⁷⁷ she and the father entered into a contract, by the terms of which, for a certain consideration, she assigned to the father, and released to him, all her interest in the partnership property and assets, and the father released her and the estate of W. H. Hayward from all debts due from the latter to the father or to the partnership.

After the father's death his estate was administered in the probate court, and on March 1, 1897, the decree of distribution was entered, which, after assigning specific portions of the estate to different heirs and distributees, assigned all the balance of the estate of four certain distributees. On May 3, 1897, these four distributees, by an instrument under seal, released and discharged defendant from all claims which they may have had on account of this note. Plaintiff admitted on the trial that there were no debts proved, or to be proved, against the estate of W. H. Hayward, and, as his widow was his sole heir and distributee, it was competent for her to make an equitable assignment of all her interest and the interest of his estate in the property and assets of the partnership, and the assignment which she has so made to the father is binding on the plaintiff, the administrator: See *Vail v. Anderson*, 61 Minn. 552; 1 *Woerner's American Law of Administration*, sec. 201; 2 *Woerner's American Law of Administration*, sec. 566; *Foote v. Foote*, 61 Mich. 181. In the case of *Wiswell v. Wiswell*, 35 Minn. 371, it did not appear that the widow who sold the horse was the sole distributee, and that there were no debts proved or to be proved against the estate. In the case at bar, these things appear conclusively. The plaintiff was appointed administrator on the petition of the widow herself, more than five years and a half after she had made said settlement with the father as surviving partner. Then, if the beneficial interest in the note in suit was in the father or in the partnership firm at the time of the death of W. H. Hayward, such interest had passed to the father by said assignment from the widow, has been assigned to said four distributees by said residuary clause in said decree of the probate court, and defendant has been released by them from liability.

Then, since the former appeal, it has become material to determine whether, on the one hand, the whole beneficial interest

in this ³⁷⁸ note was in W. H. Hayward at the time of his death, or whether, on the other hand, such interest was in his father or in the partnership firm. The evidence tends to prove that the consideration for this note came originally out of the partnership funds or the individual funds of the father, or partly from each. W. H. Hayward in his lifetime, and his estate after his death, were liable to the father for the funds so taken without the father's knowledge or consent; and it cannot be held that by the release of all claims against the son's estate, made by the father in his contract with the widow, he released a claim of which he had no knowledge, and of the existence of which he had always been fraudulently kept in ignorance. There is no evidence that W. H. Hayward accounted to the father in any manner for the funds thus drawn out. He might have accounted to the father for them as being funds drawn out for his own use and benefit, without disclosing to the father that they were applied to the payment of defendant's debts, and, if he did so account, the beneficial interest in this note would thereby have become vested in him. The partnership contract provided that true books of account should be kept, and, at least once in each year, there should be an accounting, the profits and losses ascertained, and the profits, if any, divided. But it does not appear that any such books were ever kept or any such accounting was ever had.

We are of the opinion that the evidence would warrant the jury in finding that the funds which went to pay defendant's debts were drawn out of the father's funds, or out of the funds of the partnership, or partly out of each; that W. H. Hayward never accounted to his father for the funds thus drawn out, but that the loss of the same remained the loss of the father or of the partnership, or partly of each, until after the death of W. H. Hayward; and therefore the court erred in ordering a verdict for plaintiff.

The order appealed from is reversed, and a new trial is granted.

CONTRACTS MADE FOR BENEFIT OF THIRD PARTY—RIGHT OF ACTION.—If a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon, at the instance and in the name of the party to be benefited, although the promise or contract was made without his knowledge, and without any consideration moving from him: *Brown v. Markland*, 16 Utah, 360, 67 Am. St. Rep. 629, and note.

EXECUTORS AND ADMINISTRATORS—RIGHT TO SUE.—An executor of a testator, having been clothed with commission of the probate court, is vested with the title to all the movable property

and rights of action which the deceased possessed at the instant of his death: *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298. But see *Horskins v. Williamson*, 1 T. U. P. Charl't. 145, 4 Am. Dec. 703, where it was held that where a bond is made payable to A, as the executor of B, and A dies, the right to sue upon the bond was in the representative of A, and not B.

NICOLLET NATIONAL BANK v. FRISK-TURNER Co.

[71 MINNESOTA, 413.]

CORPORATIONS—POWERS.—A corporation possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.

CORPORATIONS — DEFINITIONS. — “AN INCIDENTAL POWER is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it.”

CORPORATIONS—CONSTRUCTION OF ARTICLES OF INCORPORATIONS—MANUFACTURING.—A corporation, whose articles of incorporation state that “its business shall be the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing,” is a manufacturing corporation within the meaning of article 10, section 3, of the Minnesota constitution.

CORPORATIONS, MANUFACTURING — WHEN ARTICLES OF INCORPORATION DO NOT AUTHORIZE THE CONDUCTING OF A MERCANTILE BUSINESS.—The buying and selling of ready-made clothing is purely a mercantile business, and is unauthorized by the articles of incorporation of a manufacturing corporation permitting “the transaction of all other business necessary and incidental to such manufacture and sale of clothing.”

CORPORATIONS—POWERS—DUTIES OF THIRD PERSONS.—Strangers or third persons are presumed to know the law of the land, and are bound, when dealing with corporations, to know the powers conferred by their charters.

CORPORATIONS, CHARACTER OF — HOW DETERMINED.—At least in the absence of a fraudulent attempt to evade the law, the articles of incorporation are themselves the sole criterion to ascertain the purpose for which the corporation was formed.

CORPORATIONS—BUSINESS NOT AUTHORIZED BY ARTICLES OF INCORPORATION — LIABILITY OF STOCKHOLDERS.—The mere fact that a corporation has done some business outside that authorized by its articles does not render the stockholders, as such, liable for its corporate debts, to the amount of stock owned or held by them, although the stockholders would be so liable, under the state constitution, if such business had been authorized by its articles.

A. B. Jackson, for the appellant.

Koon, Whelan & Bennett, Keith, Evans, Thompson & Fairchild, Wilson & Van Derlip, C. J. Rockwood, and H. M. Farnam, for the respondents.

⁴¹⁵ BUCK, J. The plaintiff bank recovered a judgment against the Frisk-Turner Company on July 28, 1896, for the sum of fourteen thousand four hundred and forty-three dollars and sixteen cents, on which an execution was returned unsatisfied. On July 24, 1896, said company made an assignment, under the insolvency laws of this state, to Willard T. Atwater, one of these defendants. The total value of ⁴¹⁶ the assets which came into the assignee's possession and control did not exceed three thousand dollars. The plaintiff brought this action, by supplemental complaint, to enforce the individual liability of the shareholders of the Frisk-Turner Company. The receiver of the City Bank of Minneapolis filed an intervening complaint, asking permission to participate in the sum recovered on a claim which said City Bank had against the Frisk-Turner Company.

The question involved in this issue is, whether the stockholders of the Frisk-Turner Company are liable for the plaintiff's debt evidenced by the judgment so rendered against it. The company was organized as a corporation under the laws of this state, and the material article of the corporation is article 1, which reads as follows: "The name of the corporation shall be Frisk-Turner Company, and the principal place of transacting its business shall be at Minneapolis, in the state of Minnesota, and its business shall be the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing."

The corporation, after publishing its articles and completing its organization, began active business November 1, 1890. In addition to its own manufacture of men's and youth's clothing, and the sale thereof, it, as part of its business, bought, handled, and sold large invoices of children's manufactured ready-made clothing. These ready-made goods were purchased and handled by defendant in the ordinary course of jobbing business. The ordinary jobber's profit was added to the cost price, and the goods were then put on the market for sale. Defendant's salesmen solicited orders for them, as well as for the goods manufactured by defendant, and sold these ready-made goods either independently and separate from the goods of defendant's manufacture, or in conjunction with the latter, as customers might desire. They were not bought to fill orders previously received from customers, but were bought and sold, for profit, independently of the goods manufactured by defendant. The total

sales made by defendant company while engaged in business aggregated about one million dollars. The sales of children's clothing bought by ⁴¹⁷ defendant ready-made aggregated from five to seven per cent of the total volume of sales, or from fifty thousand dollars to seventy thousand dollars.

The defendants contend that, under these articles of incorporation, they are authorized to manufacture in part, and buy in part from other manufacturers, and to sell all the stock so acquired, as ordinary jobbers or wholesalers, without incurring the shareholder's liability which would have attached if they had declared these double purposes plainly in their articles. On the other hand, plaintiff alleges that this suit is brought upon the ground that the corporation was in fact organized for mercantile as well as manufacturing purposes, and depends wholly on the provisions of the constitution, and that any competent evidence to show that the defendant company was not organized exclusively for manufacturing purposes, so as to come within the exception to that provision, was admissible.

The constitution, article 10, section 3, provides that: "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

A corporation, being the mere creature of the law, "possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence":

Marshall, C. J., in *Trustees v. Woodward*, 4 Wheat. 518-636. The articles of incorporation in question do not authorize the Frisk-Turner Company to buy and sell clothing manufactured by concerns other than itself. Such business would be a purely "mercantile business," and the latter words and "manufacturing or mechanical business" are not interchangeable terms. Both kinds of business might, under the constitution and laws, be carried on in conjunction by one corporation, if the articles so provided; but the liabilities of the stockholders would in such case be different from those of a corporation organized to carry on an exclusively manufacturing or mechanical business, under article 10, section 3, of the constitution.

In the phrase, "the transaction of all other business necessary and incidental to such manufacture and sale of clothing," we find ⁴¹⁸ no warrant for such corporation including in its business a purely mercantile business, such as buying and selling ready-made clothing.

"An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it": *Hood v. New York*, 22 Conn. 1, 16.

The exercise of a power which might be beneficial to the principal business is not necessarily incident to it. It might be the exercise of a power inhibited by the constitution, or one not warranted by law, while the principal business might be permitted by both. The constitution exempts the stockholders in any corporation carrying on manufacturing or mechanical business from liability to the amount of the stock held or owned by him, and its purpose is self-evident. "That purpose was to encourage manufacturing enterprises by exempting those investing their capital in that business from personal liability": *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 222.

In this case if the buying and selling of ready-made clothing by virtue of its articles of incorporation is authorized under the guise of being incidental to the manufacturing and selling of its own manufactured clothing, it is difficult to see just where the partition line may be found between the principal business and that which is incidental to it. If the buying and selling of fifty thousand dollars to seventy thousand dollars' of ready-made clothing in a business of one million dollars is only incidental, who shall determine whether the buying and selling of half a million dollars' worth, more or less, of ready-made clothing is not also merely incidental. If the directors, at their option or election, can thus shift the amount and dividing line, that which is claimed to be incidental in the articles of incorporation will become the principal, and the original principal business merely incidental.

The liability of stockholders cannot rest upon any such uncertain or transitory basis. The evidence of defendants tending to show that the buying and selling of children's ready-made clothing by the corporation was necessary to the successful manufacture and sale of its own clothing cannot change the legal effect of the language used in its articles of incorporation; and the result of such business ⁴¹⁹ ending in insolvency, does not carry a very strong conviction that even the buying and selling of ready-made clothing was a necessary incident to the successful manufacture of its own clothing.

The sale of its own manufactured goods is within the constitutional provision conferring the power to carry on the manufacturing business, because such business would become futile

if such products could not be disposed of with profit. So, also, buying the raw material for the purpose of manufacturing it into articles of commerce and selling the same would be within the power conferred by the constitutional provision in question, and its articles of incorporation. It would enable it to carry on the manufacturing business contemplated by the very language of the constitution itself. But, as the buying and selling of ready-made clothing is purely a mercantile business, it is unauthorized by the articles of incorporation.

This brings us to the question whether the fact that the corporation exceeded its powers in buying and selling children's clothing already manufactured, coupled with the fact that several of the incorporators, with knowledge thereof on the part of all the directors and stockholders, after the signing of the articles, and before the commencement of the manufacturing business, purchased several hundred dollars' worth of manufactured children's clothing, with intent to sell the same, and employed salesmen for that purpose, rendered the individual stockholders liable.

While the evidence was excluded as to the acts of said incorporators, we assume that such would have been the proven fact, had not the objection to its admission been sustained. The buying and selling such ready-made clothing by the corporation, to the amount of fifty thousand dollars to seventy thousand dollars was admitted, and that it was carried on for a series of years, necessarily requiring the employment of clerks and salesmen. Hence, we feel justified in assuming, for the purpose of this decision, that the facts offered to be proven were true. But do these facts alter the liability of the stockholders?

This corporation was evidently organized under the Laws of 1873, chapter 11, and subsequent amendments, being the same as incorporated into the ⁴²⁰ General Statutes of 1894, section 2805, and subsequent sections upon the same subject. Section 2807 of this statute provides that: "The purpose for which every such corporation shall be established shall be distinctly and definitely specified by the stockholders in their articles of association, and it shall not be lawful for said corporation to direct its operations or appropriate its funds to any other purpose."

The articles in question were duly recorded in the office of the register of deeds of Hennepin county, where the corporation was located, and filed and recorded in the office of the secretary of state, and published in a public newspaper, as required

by law. Strangers or third persons are presumed to know the law of the land, and are bound, when dealing with corporations, to know the powers conferred by their charters: *Kraniger v. People's Building Soc.*, 60 Minn. 94. The act of the corporation in buying and selling ready-made clothing was not only a direct violation of the law above quoted, but a violation of the articles of its incorporation. But this violation was well known to the plaintiff, from actual knowledge received as to what the corporation was doing and intended to do, as well as from its presumptive knowledge of the contents of the articles so recorded and published, and the law above quoted. The representation of the incorporators was not made upon an apparent authority based upon private papers, to which strangers had no access, but that they were buying and selling, and intended to continue to buy and sell, ready-made clothing in violation of law and their articles of incorporation, which plaintiff, knowing such acts to be unlawful, had no right to rely upon.

What the result would be if it appeared that the whole scheme was a fraudulent contrivance on the part of the corporators to evade their constitutional liability we need not consider. There were not the slightest indicia of fraud in the whole transaction. It was not alleged or proved, and was specifically disclaimed by plaintiff's counsel on the argument of this case. Nor were such representations the acts of the corporation. The charter was the measure of its power as to all parties dealing with it. At least, in the absence of such fraudulent attempt to evade the law, the articles of incorporation are themselves the sole criterion to ascertain the purpose ⁴²¹ for which the corporation was formed. But the mere fact that, as in this case, it had done some business outside that authorized by its articles, does not render the stockholders, as such, liable for its corporate debts, to the amount of stock owned or held by them.

There are no authorities in this court to the contrary of the views herein expressed. In the case of *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, it was held that the general nature of the business of the corporation, as defined by its articles of incorporation, was the manufacture or brewing of lager beer, and selling and disposing of the same, together with such other business as might be incidental thereto, and hence that it was exclusively a manufacturing corporation, and its stockholders not liable for the corporate debts, beyond the amount due on their stock subscription. The liability of the corporation for dealing in business outside of that authorized by its articles was not involved. *First Nat. Bank v. Winona*

Plow Co., 58 Minn. 167, was a case where it appeared from its articles that it was not only formed for the manufacture and sale of farm implements, but for the purchase and sale of others already manufactured; and it was held that it was not organized for the purpose of carrying on an exclusively manufacturing business, and its stockholders were held liable for its corporate debts to the amount of their stock. *Densmore v. Shepard*, 46 Minn. 54, involved the construction of articles which provided that the general nature of the business was to be "the manufacturing and sale of lime, quarrying stone for making lime and for building and other purposes, digging and selling sand, together with the buying and selling of lime, hair, sand, cement, and like articles, and other building materials, and the doing of all things necessary to carry on said business"; and it was held that it was not organized exclusively for the purpose of carrying on a manufacturing business. In other cases where the same rule was applied, the articles themselves authorized the carrying on or doing some kind of independent business in addition to that of manufacturing, and such cases have no controlling influence on the question here involved. The power to do such independent business was there given by the articles, and, in going beyond the manufacturing business, the corporation still kept ⁴²² within the limits of its charter; but in so doing the stockholders became liable, not because they had violated the law, but because their articles authorized the corporation to carry on a business other than that of manufacturing, though in strict compliance with that authorized by the articles themselves. The distinction is obvious.

What other remedies creditors may have against those in the management or control of the affairs of a manufacturing corporation, who have extended, or authorized the extension of, its business beyond what was authorized by its articles, is a question not now before us.

Order affirmed.

CORPORATIONS—POWERS.—A corporation possesses only such powers as are expressly given it by law, and such implied powers as are necessary to enable it to exercise the express powers thus given: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, and note; *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342.

CORPORATIONS—AN INCIDENTAL POWER is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319.

CORPORATIONS—POWERS—DUTIES OF THIRD PERSONS.—

He who deals with a corporation is chargeable with notice of its powers and the purposes for which it was formed, and, when dealing with its agents or officers, is bound to know the extent of their powers and authority: *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482; *Durkee v. People* 155 Ill. 354, 46 Am. St. Rep. 340; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302; *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798.

CORPORATIONS—CHARACTER OF.—The character of a corporation, whether public or private, depends upon the purposes for which it was formed, and the powers conferred upon it, and not upon the character of its stockholders: *Bardstown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199, 81 Am. Dec. 541.

FONDA v. ST. PAUL CITY RAILWAY COMPANY.

[71 MINNESOTA, 433.]

STREET RAILWAYS—EVIDENCE—GENERAL INCOMPETENCY OF MOTORMAN.—Evidence of the general incompetency of a motorman, based on the observations of witnesses who had seen him operate his car on prior occasions, is inadmissible to establish negligence at the time of the accident.

STREET RAILWAYS—MASTER AND SERVANT—EVIDENCE—RULES OF COMPANY.—The private rules of a master regulating the conduct of his servants in the management of his own business, intended only for the guidance of his servants, although designed for the protection of others, are not admissible in evidence to establish negligence on the part of the master.

NEGLIGENCE—STANDARD OF DUTY.—A person cannot, by the adoption of private rules, fix the standard of his duty to others.

STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE—WANTON CONDUCT OF MOTORMAN.—A plaintiff may recover of a street railway company, notwithstanding that he might have negligently placed himself in a place of danger, if the conduct of the motorman in running him down was wanton and willful, or if, after discovering the plaintiff in a place of danger in time to have prevented the injury by the exercise of reasonable care, he failed to do so.

CONTRIBUTORY NEGLIGENCE—POWER OF DEFENDANT TO AVOID CONSEQUENCES OF PLAINTIFF'S NEGLIGENCE.—The doctrine that a plaintiff may recover if the defendant might, by the exercise of care, have avoided the consequences of the plaintiff's negligence, is only applicable to cases in which the plaintiff's negligence preceded that of the defendant. But when the negligence of the two persons is contemporaneous, and the fault of each operates directly to cause the injury, neither can recover from the other.

CONTRIBUTORY NEGLIGENCE—WILLFUL ACT OF DEFENDANT.—Where the defendant's acts are willful and intentional, the negligence of the plaintiff, if any, is no longer deemed in law a proximate cause of the injury.

COMPARATIVE NEGLIGENCE.—The doctrine of comparative negligence has never been recognized in Minnesota.

PRESUMPTION — SUPPRESSION OF EVIDENCE. — The presumption arising from the spoliation or suppression of evidence that it would, if produced, be unfavorable to the party destroying or suppressing it, is not limited to the case of documentary evidence in the exclusive possession and control of the party.

WITNESS, FAILURE TO CALL — PRESUMPTION — INSTRUCTIONS. — The omission of the defendant to call its motorman as a witness, though available, will justify the court in instructing the jury that, in weighing the evidence introduced, they are at liberty to indulge in the presumption that the testimony of the motorman, if introduced, would not have been favorable to the defendant's cause.

Munn & Thygeson, for the appellant.

Stevens, O'Brien, Cole & Albrecht, for the respondent.

443 MITCHELL, J. The plaintiff, a stranger to and not an employé of, the defendant, recovered a verdict for personal injuries caused by the alleged negligence of defendant's servants; and from an order denying its motion for judgment, notwithstanding the verdict, or for a new trial, the defendant appealed.

1. The first three assignments of error challenge the sufficiency of the evidence to justify the verdict, for the reasons: 1. That it failed to establish any negligence on the part of the defendant; and 2. That it conclusively appeared that the plaintiff himself was guilty of contributory negligence.

The accident occurred at or near the easterly intersection of Walnut and Seventh streets, in the city of St. Paul. These streets intersect each other at right angles, the course of Walnut street being northerly and southerly, and that of Seventh street easterly and westerly. The width of Seventh street from curb to curb is forty-six feet. Along the middle of this street the defendant has two parallel tracks, the northerly track being used by west-bound and the southerly by east-bound cars. These tracks are four and three-quarters feet wide, and the space between them is a little less than four feet—sufficient to permit cars to pass each other in safety.

In the forenoon of the day of the accident, plaintiff had traveled southerly, down Walnut street, to Seventh, for the purpose of taking an east-bound car going down town. He had reached the northeast corner of Walnut and Seventh, and then started to cross the latter, for the purpose of getting on the south side of the southerly track in order to take his car. His testimony as to what occurred is as follows: "Just as I left the sidewalk to cross Seventh street, I looked up, and looked both ways. I saw a car approaching from the east over a block away, and I also looked the other way toward the west, and there was

a car coming from that way too; and I walked out on the rails, and my intention was, as I walked out there, to ⁴⁴⁴ get across the rails, before the east-bound car got down there (the car I was going to take). As I walked out on the track, that east-bound car got down there, and I couldn't cross it. So I hesitated a minute as the car got down by me. Then I started to walk around the tail end. Just as I started to walk around the tail end, and took a few steps, this west-bound car came along, and struck me, and knocked me down."

Leaving out of consideration for the present plaintiff's statement as to the distance of the west-bound car when he looked eastward, this testimony photographs quite correctly the general situation and manner in which the accident occurred. Evidently, the plaintiff estimated that he had time to cross both tracks before either car would reach the street crossing, but he overestimated the length of time it would take the east-bound car to arrive. Hence, when he reached the space between the two tracks, he found the east-bound car in too close proximity to enable him to cross in front of it, and then hurriedly turned to the west in order to go around the rear end of it. He testified that when he looked west, as he started to cross Seventh street, the east-bound car was a little this side of the middle of the block (that is, the block immediately west of Walnut street), and was coming down a pretty good gait.

The testimony of other witnesses as to the respective distances of the two cars when plaintiff started to cross Seventh street is conflicting. Plaintiff testified that he walked across Seventh street at an ordinary gait, of three or four miles an hour, until he turned to the west to pass around the end of the east-bound car, when he increased his speed. After he looked east, as he stepped from the curbstone to cross Seventh street, he did not again look to see how far the west-bound car was from him. Just as he stepped upon the northerly track, he signaled the east-bound car to stop. He testified that he heard the gong on the east-bound, but not on the west-bound, car. The other evidence was conflicting as to whether any signal was given on the latter of its approach to the street crossing.

The evidence as to the rate of speed of the west-bound car when it reached the Walnut street crossing, and passed the other car, varied from seven or eight miles up to fifteen or twenty miles an hour. Other evidence in the case is, perhaps, conclusive that the latter is an overestimate; but the jury would have been amply ⁴⁴⁵ justified in finding that it was considerably more than seven or eight miles; also, that its previous rate

of speed was not at all slackened as it approached the street crossing. Approaching Walnut street from the east, Seventh street is on a downgrade, and on that forenoon the rails of the track were somewhat wet and slippery from recent rain. The motorman on the west-bound car was not produced as a witness on the trial. There were numerous other facts and circumstances in evidence having more or less bearing upon the questions of defendant's negligence and of plaintiff's contributory negligence, but what has been stated will give a fairly correct and complete idea of the general drift of the evidence.

The conjuncture of circumstances was such as to require peculiar caution on the part of the motorman on the west-bound car. He was approaching the crossing of two much-traveled streets in a populous part of the city. He knew, or ought to have known, that he was about to pass another car, and that, too, on the side of the crossing where it was liable to stop to let off or take on passengers—a place of peculiar danger. The jury were abundantly justified in finding that he was guilty of negligence.

The question of plaintiff's contributory negligence was, under the evidence, also a question for the jury. A court would not be justified in holding, as a matter of law, that he was negligent. The number of concurring circumstances that bear upon that question makes the case peculiarly one for a jury.

The strongest argument that can be advanced against the plaintiff's conduct is that he did not continue to watch the west-bound car after he left the curb to cross Seventh street. But it must be remembered that the distance he had to travel was very short, and would occupy only a very few seconds. He would apparently have crossed the north track in safety but for the (to him) unanticipated arrival of the east-bound car. Doubtless, his attention was directed to that car, which was the one he desired to board; but the situation was one which was calculated to distract his thoughts from the west-bound car. He was suddenly confronted with an unexpected emergency, with little time to decide on his course of action. He had seen, as the jury might have found, the west-bound car quite a distance away when he started to cross Seventh street. He had ⁴⁴⁶ no reason to anticipate that it would be run at any unlawful or unusual rate of speed. On the contrary, he might reasonably expect that it would, in accordance with what everyone knows of the general custom, approach with caution and slackened speed a street crossing, where another car going in the opposite direction was about to stop to take on or let off passengers. Our

conclusion is, that the evidence justified the verdict; but, for errors of law occurring on the trial, there must be a reversal.

2. Upon the trial, the court, against the objection of defendant, admitted evidence of the general incompetency of the motorman, based on the observations of witnesses who had seen him operate his car on prior occasions. We think this was error. The defendant is liable, if at all, for the acts of its servant upon the doctrine of respondeat superior. If the motorman was negligent on this occasion, the defendant is liable, no matter how competent he was or how habitually careful he had been on other occasions. On the other hand, if he was not negligent on this occasion, the defendant is not liable, notwithstanding that he may have been incompetent or habitually careless on former occasions. The sole issue, aside from that as to plaintiff's contributory negligence, was whether or not the motorman was guilty of negligence at the time of the accident.

When the act or omission is proved, whether it be actionable negligence is to be determined by the character of the act or omission itself, and not by the character of prior acts of the party committing it. If the plaintiff could offer testimony as to the general incompetency or as to prior negligent acts or omissions of the motorman, then with equal propriety the defendant, upon the issue of contributory negligence, might offer evidence of plaintiff's general carelessness, or of his negligent acts on other occasions. Indeed, we do not see why plaintiff would not, upon the same principle, have the right to introduce evidence that he himself was an habitually careful and cautious man. As the liability of a master for the acts of his servant rests upon the doctrine of respondeat superior, it can make no difference as to the admissibility of such evidence whether the alleged negligent act was committed by the servant or by the master in person. Hence, if the offered evidence was admissible 447 in this case, it would have been equally competent had the defendant been a natural person, and operating the car himself, to prove that he was incompetent to perform such work, or had performed it negligently on former occasions.

There are some cases which hold that where the person injured was killed, and there were no eyewitnesses of the occurrence, the general character of the deceased as a careful and prudent man may be shown, for the purpose of raising a presumption that he was not negligent on the occasion in question. But this rule is based upon the supposed necessities of the case, and is repudiated by very eminent authorities. There is also a line of authorities which holds that, where the issue is whether

a particular act or a particular way of doing it is or is not negligent, evidence is admissible to show that people generally under similar circumstances do the act, or do it in the same way. This is upon the ground that what men generally do under like circumstances is some test of ordinary care. But these cases have no bearing upon the question now under consideration.

Many of the authorities cited by plaintiff's counsel are cases where a servant brought an action against his master for injuries caused by the negligence of a fellow-servant. In such cases, the doctrine of respondeat superior does not apply, the gist of action being the negligence of the master in employing or retaining an incompetent servant. A moment's reflection will show that such cases are not at all in point. One or two of the cases cited by counsel were actions against the vendor for breach of warranty as to the efficiency of a machine in certain particulars going to its general mechanism, and where it was held that it was competent to show that other machines of the same pattern, made and sold by the same vendor, had been tried and found defective in the same particulars. The principle upon which these cases proceed is very apparent, and is the same upon which, in "fire cases," it has been held that it is competent to show that the locomotive alleged to have started the fire in question started other fires about the same time.

We have examined all of the numerous cases cited on this question, and find that, aside from obiter remarks in one or two of which ⁴⁴⁸ the question was not involved or not raised, only the following at all tend to support plaintiff's contention, viz.: Vicksburg etc. R. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; State v. Manchester, 52 N. H. 528; Craven v. Central Pac. R. R. Co., 72 Cal. 345; State v. Boston etc. R. R. Co., 58 N. H. 410. But a careful examination of these cases shows that all they hold (unless it is the first) is that when evidence is conflicting as to whether a person, in conducting his business or performing his services, performed a particular act, or performed it in a particular way, it is competent to show that he was in the habit of performing the act or performing it in that particular way, not as evidence of character or of fitness or unfitness, but simply as having some tendency to show that on the particular occasion in question he probably did the act, or did it in a particular way, in accordance with his general habit or custom.

Whether this rule is correct or incorrect, it falls short of sustaining the contention of plaintiff's counsel in the present case. The evidence introduced was not directed or limited to showing

that the motorman was in the habit of doing or omitting to do some particular act which the other evidence tended to prove that he did or omitted to do on the occasion in question. It was to the effect that he was generally incompetent, as shown in a variety of ways, by his method of managing his car on former occasions. In brief, the inference sought to be drawn is, that if he was generally incompetent, it was more probably that he operated the car improperly on this occasion. Such an inference might at first blush seem to be a legitimate one, but it is too remote and conjectural to be permissible. Any such rule of evidence would drag innumerable collateral issues into the trial of a case; for evidence of general incompetency would necessarily result in the introduction of evidence of particular acts.

3. The court also admitted in evidence, over defendant's objection, its rules intended only for the guidance of its own employés in the operation of its cars. We think this was error. There was no evidence that the plaintiff had any knowledge of the existence of these rules or of any custom, based upon them, as to the manner of operating cars; hence his conduct could not have been in any way affected or influenced by them. It is not claimed that these ⁴⁴⁹ rules require or permit anything that is inconsistent with reasonable care. The theory upon which they were offered was that they tended to show what duty the defendant owed to the public in the operation of its cars, and hence that a violation of any of them, being a breach of such duty, constituted actionable negligence, or at least was evidence of it.

Private rules of a master regulating the conduct of his servants in the management of his own business, although designed for the protection of others, stand on an entirely different footing from statutes and municipal ordinances designed for the protection of the public. The latter, as far as they go, fix the standard of duty toward those whom they were intended to protect, and a violation of them is negligence in law or per se. But a person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common. Such rules may require more, or they may require less, than the law requires; and whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party.

Under some circumstances, such rules may become an im-

portant factor in the application of legal principles to the conduct of a person; as, for example, where the rule was known to him, and he governed, or had a right to govern, his conduct accordingly. Such was the case of *Smithson v. Chicago Great Western*, 71 Minn. 216. In that case the rule was known to, and obligatory upon, both the party injured and the party guilty of the alleged negligent act. Each was bound to know that the other might and could regulate his own conduct on the assumption that he would obey the rule. Some of the cases cited by counsel come within this class, and hence have no application here. Others were cases of servants against their masters, in which the gist of the action was the failure of the master to perform his absolute duty to his servants to make and promulgate rules which, if observed, would give reasonable protection to his employés. These cases are equally inapplicable. Some are cases of municipal ordinances, which, for reasons already given, are not in point.

There are a few cases which support plaintiff's contention, but in ⁴⁵⁰ none of them is the question considered or discussed at any length, and in some of them no reason whatever is given for the decision. The only reason assigned in any of them why such evidence is admissible is that it is in the nature of an admission by the party promulgating the rule that reasonable care required the exercise of all the precautions therein prescribed: *Georgia R. R. Co. v. Williams*, 74 Ga. 723; *Lake Shore etc. Ry. Co. v. Ward*, 135 Ill. 511. The fallaciousness and unfairness of any such doctrine ought to be apparent on a moment's reflection. The effect of it is, that the more cautious and careful a man is in the adoption of rules in the management of his business in order to protect others, the worse he is off, and the higher the degree of care he is bound to exercise. A person may, out of abundant caution, adopt rules requiring of his employés a much higher degree of care than the law imposes. This is a practice that ought to be encouraged, and not discouraged. But, if the adoption of such a course is to be used against him as an admission, he would naturally find it to his interest not to adopt any rules at all.

To treat the adoption of such rules as an admission against the party would involve the same principle as treating repairs or improvements made after an accident as an admission of prior defects—a doctrine long since repudiated by this court, and now repudiated by most of the courts of the country: *Morse v. Minneapolis etc. Ry. Co.*, 30 Minn. 465. If we could hold, as a matter of law, that these rules required nothing more than was required

in the exercise of reasonable care, their admission would be error without prejudice; but an examination of them satisfies us that we cannot so hold.

4. The court instructed the jury, in substance, that the plaintiff might recover, notwithstanding that he might have negligently placed himself in a place of danger, if they found that the conduct of the motorman in running him down was wanton and willful, or if, after discovering the plaintiff in a place of danger in time to have prevented the injury by the exercise of reasonable care, he failed to do so. Counsel do not dispute the correctness of this instruction as an abstract proposition of law, but contend that there was no evidence to justify the court in submitting any such ⁴⁵¹ question to the jury. In this, we think, they are right. The jury might have been justified in finding that the motorman was grossly negligent, under the circumstances, in running his car at so high a rate of speed, and also in failing to keep a proper lookout to discover people on the track; but we do not think that there was any evidence that would have justified them in finding that he wantonly and willfully injured the plaintiff, or that he discovered him in a place of danger in time to have avoided the accident.

Counsel for plaintiff contend that it was not necessary, in order to make the instructions applicable, that the motorman should have actually seen the plaintiff in a place of danger in time to have avoided the injury; that it was sufficient if, in the exercise of due care, he ought to have discovered him. Any such rule in cases of concurrent negligence proximately contributing to the injury would practically do away with the doctrine of contributory negligence altogether.

It is sometimes said that the plaintiff may be entitled to recover if the defendant might, by the exercise of care, have avoided the consequences of the plaintiff's negligence. But this doctrine is only applicable to cases in which the plaintiff's negligence preceded that of the defendant. But when the negligence of the two persons is contemporaneous, and the fault of each operates directly to cause the injury, neither can recover from the other: Bigelow on Torts, 311.

The true question in all cases is whether there was negligence on part of the plaintiff contributing directly as a proximate cause to the injury. If there was, he cannot recover. Where the defendant's acts are willful and intentional, the negligence of the plaintiff, if any, is no longer deemed in law a proximate cause of the injury. In such cases the willful and intentional acts of the defendant are deemed the sole proximate cause, and the neg-

ligence of the plaintiff only the remote cause, or, more properly speaking, the mere occasion, of the injury. The same is true where, after discovery of plaintiff's negligence in time to avoid injury to him, the defendant neglects to exercise due care to do so. Some confusion of ideas has arisen from the fact that courts, especially in the older decisions, have frequently used the word "gross" as if synonymous with "willful" and "wanton," thereby conveying the impression that ⁴⁵² a plaintiff may recover, notwithstanding his own contributory negligence, provided the negligence of the defendant was gross. This would be to adopt the doctrine of comparative negligence, which has never been recognized by this court.

5. The defendant did not call its motorman as a witness, although it appeared that during the trial he was seen on one occasion in conversation with its counsel, and on another at its car barn in the city of St. Paul. In view of this fact, the court instructed the jury that: 1. "If either party to this action has failed to adduce evidence within its control which is reasonably calculated to throw light upon the conduct and responsibility of either party, such failure may be considered by the jury as tending to militate against the contention of such party with reference to the issue regarding which such evidence would have been pertinent."

This is assigned as error. The presumption, arising from the spoliation or suppression of evidence, that it would, if produced, be unfavorable to the party destroying or suppressing it, obtains with most force to the case of documentary evidence in the exclusive possession and control of the party. But the presumption is not necessarily limited to such cases. It is true that no unfavorable inference arises in ordinary cases from the mere failure to call as a witness one whom the other party had the same opportunity of calling or one whose testimony would be merely cumulative. There is also great danger of such a presumption being allowed to supersede the necessity of other evidence, instead of being used merely as a means of weighing the effect of the evidence actually produced applicable to the subject in dispute. But here the motorman was presumably the person, of all others, who could have fully and accurately informed the jury just how he operated the car, and explained what he did and what he saw. Instead of calling him, the defendant contented itself with calling bystanders, passengers, and others whose knowledge on the subject in dispute was presumably much less full and accurate. It is true, the plaintiff might have procured his attendance by subpoena, and thus ob-

tained his testimony; but he was not bound to do so. This would have amounted substantially to going "into the enemy's camp" for evidence, and ⁴⁵³ calling the very man charged with the negligence which caused the injury.

Under the circumstances, we think the omission of the defendant to call him as a witness would have been a legitimate subject of comment to the jury by plaintiff's counsel, and that there would have been no error in the court's instructing the jury that, in weighing the evidence introduced, they would be at liberty to indulge in the presumption that the testimony of the motor-man, if introduced, would not have been favorable to defendant's cause: See 1 Jones on Evidence, sec. 16 et seq., and cases cited.

But, for the errors already referred to, the order appealed from must be reversed, and a new trial granted.

So ordered.

RAILROAD COMPANIES—EVIDENCE—HABITS OF CONDUCTOR.—Evidence of the habits and competency of a conductor in the employ of a railroad company is admissible: *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229. But see *Gahagan v. Boston etc. R. R. Co.*, 1 Allen, 187, 79 Am. Dec. 724, and note.

RAILROAD COMPANIES.—BREACH OF RULES of a railroad company by its employes does not necessarily raise an inference of negligence: *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300, 86 Am. Dec. 544.

STREET RAILWAYS — CONTRIBUTORY NEGLIGENCE — WILLFUL CONDUCT OF EMPLOYEE.—Although a person with a wagon drives incautiously upon a street railway track at a public crossing, the company cannot recklessly run him down, and then shield itself from liability on the ground that such person was negligent in the first instance: *Hall v. Ogden City etc. Ry. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726.

RAILROAD COMPANIES — NEGLIGENCE — WHERE BOTH PARTIES ARE NEGLIGENT.—If both parties are negligent, the true rule is, that the party who last has a clear opportunity to avoid an accident, notwithstanding the negligence of his opponent, is considered solely responsible for it: *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 67 Am. St. Rep. 621; *Keefe v. Chicago etc. Ry. Co.*, 92 Iowa, 182, 54 Am. St. Rep. 542.

NEGLIGENCE—COMPARATIVE.—The doctrine of comparative negligence has never been recognized in Missouri: *Hurt v. St. Louis etc. Ry. Co.*, 94 Mo. 255, 4 Am. St. Rep. 374.

WITNESSES—FAILURE TO CALL.—It is the defendant's duty, in an action for negligence, to call and examine a witness whose fault caused the injury, and, if he fails to do so, all legal presumptions are unfavorable to his testimony: *Barnes v. Shreveport City t. R. Co.*, 47 La. Ann. 1218, 49 Am. St. Rep. 400.

MERCANTILE NATIONAL BANK v. MACFARLANE.

[71 MINNESOTA, 497.]

INSOLVENCY—CREDITOR—COLLATERAL SECURITY.—The rule that a creditor of an insolvent, having collateral sufficient to satisfy a part only of his debt, is entitled to prove the whole of his claim, and cannot be required to allow credit for any collections made after the date of the insolvency, does not apply where the insolvent's liability is that of indorser upon negotiable notes, which it discounted to a third party, his liability becoming fixed subsequent to the insolvency, and where there is no indebtedness independent of the notes.

NEGOTIABLE INSTRUMENTS—RELATION OF INDORSER AND HOLDER.—The relation of an indorser and a holder of negotiable paper is analogous to that of a principal and surety.

INSOLVENCY—NEGOTIABLE INSTRUMENTS—CLAIM OF HOLDER AGAINST INSOLVENT INDORSER.—Where the holder of a bill or note applies to prove his debt against the estate of an insolvent surety, any sum actually received in payment from another party to the obligation must be deducted from the amount to be proved. The sum actually remaining unpaid must be the basis upon which the dividend is to be computed.

INSOLVENCY—NEGOTIABLE INSTRUMENTS—RIGHTS OF HOLDER AGAINST INSOLVENT INDORSER.—The holder of a note or bill indorsed by an insolvent need not enforce its collection, as against parties primarily liable, before he can make a claim upon the insolvent estate. Nor is he required to surrender up the obligation as a condition to participating in dividends. In the absence of statute he may proceed against the insolvent estate, and also against the other parties to the obligation, until his debt is fully collected.

SUBROGATION—INSOLVENCY—RIGHT OF ACTION OF RECEIVER.—The receiver of an insolvent indorser has a right of action against the original obligors upon the paper, upon the payment of a dividend to the creditor holder; and upon full payment, the estate of the insolvent is subrogated to all of the creditors' rights as against prior parties.

INSOLVENCY—ATTACHMENT—EFFECT ON RIGHTS OF CREDITOR.—A proceeding in attachment, unnecessary to protect the creditor as to money of an insolvent debtor in the creditor's hands, will not affect the creditor's right to prove the balance of his claim, and to share in the distribution of the insolvent's estate.

William C. White, for the plaintiff.

Billson, Congdon & Dickinson, for the defendant.

408 COLLINS, J. Macfarlane became the duly appointed and legally qualified receiver of the Security Bank of Duluth, an insolvent, August 16, 1896, under the provisions of the Laws of 1895, chapter 145. On that day, the claimant, a banking institution in New York City, held commercial paper and notes previously discounted and indorsed by the insolvent, and not yet due, to the amount of \$62,600. The insolvent also had on deposit with claimant, in New York, a sum exceeding \$19,000.

Immediately after the insolvency, other creditors of the insolvent instituted proceedings, and attached this deposit; whereupon the claimant commenced action, attached the money on deposit and also the notes before referred to, which it had already discounted. Subsequently, by stipulation and an order of the court, the receiver and claimant bank settled up and caused to be released these attachments, and out of this settlement the bank received nearly \$13,000. It had also received, on account of and as payments upon the indorsed paper, after the receiver was appointed, and prior to the day this cause was submitted to the court for its decision, nearly \$18,000, so that there remained due to it, upon the indorsement on the day last mentioned, July 13, 1897, the sum of \$32,269.79.

In February, 1897, the bank filed its claim with the receiver, alleging the amount due and unpaid on account of the indorsements made by the insolvent to be \$33,731.68, besides interest and protest fees. On this claim the receiver allowed the sum of \$27,756.60, and no more. The claimant then appealed to the district court, alleging in its complaint that the actual amount due on ⁴⁹⁹ its claims was erroneously and incorrectly stated when presented to the receiver, and that it should have been \$62,600, besides certain protest fees. A trial resulted in findings of fact to the effect, in addition to the facts above stated, that the balance due claimant bank on account of the indorsed paper on said July 13, 1897, amounted to \$32,269.79; that the bank still retained possession of all of said indorsed notes, except such thereof as had been fully paid by the makers; and that it assumed to hold and enforce the remainder as against makers and indorsers prior to the insolvent's indorsement.

The court found, as matters of law, that the claimant bank was entitled to have been allowed, as a claim against the insolvent estate, the sum last mentioned, subject, however, to the condition that, before being allowed to participate in any dividend or dividends which had been theretofore or should be thereafter declared, the claimant should be required to account to the receiver for all moneys paid as principal upon the notes held by it subsequent to the date last mentioned, the amount thereof to be deducted from the sum allowed as a claim, the unpaid balance to be the sum or basis upon which dividends were to be computed and paid to said claimant, such accounting and deduction to be made as often as any dividend is declared in which the claimant seeks to participate, and that claimant be entitled to retain and collect all of such paper, subject to its

obligation to account for collections, when seeking to participate in dividends. Judgment was entered on these conclusions, and cross appeals taken.

On claimant's appeal it is contended that the trial court erred in not allowing as a claim against the estate, and as a basis for the computation and allowance of dividends, the full sum of the obligation as it originally existed—\$62,600—and also erred when holding that claimant must account to the receiver for any and all payments on the principal sums due, made subsequent to July 13, 1897, the unpaid balance to be the sum upon which dividends are to be computed and paid, in case claimant seeks to participate in dividends.

On the receiver's appeal it is claimed by his counsel that the court was in error when it determined that the claimant could retain ⁵⁰⁰ all of the note remaining unpaid on the day referred to and enforce collection thereof as against the makers and prior indorsers, subject only to the obligation to account for the sums paid thereon prior to the time of any distribution of the trust funds by the receiver. It is further contended that the claim should have been wholly rejected, because the claimant bank had elected, before filing the same with the receiver, to proceed by attachment in the state of New York, and to there pursue to a successful termination a remedy directly opposed and hostile to the law here being enforced, and the benefits of which the claimant now invokes.

In *Ueland v. Haugan*, 70 Minn. 349, we held that the provisions of the General Statutes of 1894, chapter 76, are applicable where receivers have been appointed for insolvent banking corporations, in accordance with the Laws of 1895, chapter 145, section 20. The effect of that decision, in addition to supplementing the provisions of chapter 145 by those of the older statute, was to ingraft upon all proceedings thereunder the rules of practice and the code of procedure which had been built up by the courts for the government of cases arising under said chapter 76. But in neither of these statutes is there any rule prescribed for the allowance of claims, or for the distribution of the trust funds among creditors. The only reference made to the subject is the very general provision in section 20 of the 1895 laws, for the payment of debts, "upon the order of the court." That the mode of procedure and the rule of distribution must be certain and uniform in all cases is self-evident.

Counsel for the receiver argue that we should adopt and apply in these proceedings the statutory requirements affecting cred-

itors holding securities, found in the insolvency laws, because the same express the general and settled policy of the state in respect to the subject of the distribution of the assets of an insolvent; and they also argue that the statutory requirements are nothing more than the equity rule applicable in the absence of statutory regulations. We cannot now agree with counsel on the first proposition; that is, we are not now willing to admit that any of the various provisions of the insolvency laws can be read into the 1895 law; and it is manifest that the equity rule which they insist upon has no application to the facts before us, as will be shown hereinafter.

⁵⁰¹ Counsel for the creditor contends that the rule which should be applied in cases of this kind is that which prevails in many of the states, to the effect that a creditor, having collateral sufficient to satisfy a part only of his debt, is entitled to prove the whole of his claim against assets in the hands of a receiver, and cannot be required to allow credit for any collections or payments made after the date of the declared insolvency from collateral securities. Money received on the collaterals after declared insolvency is to be considered as still held as collateral to the debt, and is not to be deemed a payment thereon. Citing *Gluck and Becker on Receivers*, sec. 90; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. Rep. 372, and other authorities.

A most excellent reason for declining to apply this rule, even if it is the law in a proper case, is that the facts here do not present any question of collateral security at all. The liability of the insolvent was that of indorser upon a number of negotiable promissory notes, which it discounted to a third party, and upon which its liability to the latter became fixed and certain by due protest of the paper as it matured, subsequently to the declared insolvency. There was no indebtedness independent of the notes, and they were not held as collateral. The relations between the insolvent indorser and the claimant indorsee were simply analogous to those of a principal and surety, the suretyship of the insolvent arising out of the indorsement of the notes; and the case is to be determined with reference to this fact.

The settled rule, in the absence of a statute, is that where the holder of a note or bill applies to prove his debt against the estate of an insolvent surety, any sum actually received in payment from another party to the obligation must be deducted from the amount to be proved. The sum actually remaining unpaid must be the basis upon which the dividend is to be com-

puted: *In re Babcock*, 3 Story, 393, Fed. Cas. No. 696; *Sohier v. Loring*, 6 Cush, 537.

It is evident that no other rule could be adopted in the administration of the estate of an insolvent surety without wholly ignoring his rights as such surety, as the same have been definitely settled by the courts. Nor is there any rule of law or equity which requires that the holder of a note or bill indorsed by an insolvent ⁵⁰² must enforce its collection, as against parties primarily liable, before he can make a claim upon the insolvent estate. Nor is he required to surrender up the obligation as a condition to participating in dividends. In the absence of a statute, he may proceed against the insolvent estate, and also against the other parties to the obligation, until his debt is fully collected: See *In re Babcock*, 3 Story, 393. Immediately upon the payment of a dividend to the creditor, the receiver can proceed against the original obligors upon the paper, and as to them enforce collection of the amount paid; and, upon full payment of the obligation, the estate is subrogated to all of the creditors' rights as against prior parties.

From the principles laid down in reference to the administration of the estate of insolvent sureties, it is clear that the conclusions of law of the court below were correct, and that the order appealed from must be affirmed.

A few words in reference to the contention of counsel for the receiver that the claim against the estate should have been wholly rejected, for reasons hereinbefore stated: When the debtor was declared insolvent, the creditor had in its possession, on what is known as a "general deposit account," a large sum of money. The title of the receiver to this money, by virtue of his appointment under the statute, would have been recognized and enforced in the state of New York if no injustice to the citizens of that state would have resulted, and if the rights of creditors were not thereby prejudiced, provided such title was not in conflict with the laws or public policy of that state. Subject to these conditions, the receiver could have appeared in the courts of that state, and have maintained an action for the recovery of the money: *In re Waite*, 99 N. Y. 433. The same rule prevails here: *Comstock v. Frederickson*, 51 Minn. 350.

It must stand admitted that the creditor had the legal right to proceed by attachment as against the deposit account. But should we hold that, by availing itself of this legal right, the creditor claimant had barred itself from making any claim in the insolvency proceeding under a law which it had disregarded

when preventing, by reason of its seizure of the money, an equal distribution of the assets of the insolvent, we should be met by the fact ⁵⁰³ that no attachment proceedings were necessary in order to protect the creditor as to the money in its hands when insolvency was declared. It had the right to retain the money on general deposit, and to offset as against the same the amount due from the depositor debtor on account of the indorsements. Had it done this, instead of unnecessarily proceeding by attachment, its right thereafter, and as to the balance due on the indorsed obligations, to participate in dividends, could not well be doubted. As it had the right to offset its notes to the extent of the deposit, its proceeding by attachment cannot be said to have materially affected the question of its right to prove the balance of its claim, and to share in the distribution.

From the statement of facts it appears that, in accordance with the provisions of the insolvency laws, this claim was originally presented and passed upon by the receiver. This was irregular. The claim should have been exhibited to the court in accordance with the chapter 76, section 5911, of the General Statutes of 1894. But this irregularity is of no consequence, and can have no bearing upon the present appeals.

Judgment affirmed.

INSOLVENCY—SECURED CREDITOR'S ENTIRE CLAIM PROVABLE.—A creditor whose claim is secured by a mortgage may prove the entire claim against the estate of an insolvent debtor, and is entitled to a dividend on the face of such claim, without regard to the value of the mortgaged property: *Kellogg v. Miller*, 22 Or. 406, 29 Am. St. Rep. 618.

INSOLVENCY—NEGOTIABLE INSTRUMENTS—CLAIM OF HOLDER AGAINST INSOLVENT INDORSER AND MAKER. Where the maker and the indorser of a promissory note made assignments for the benefit of their creditors, and each estate paid a dividend, it was held that the holder of the note was entitled to a dividend upon the whole amount of the note from each estate: *Miller's Estate*, 82 Pa. St. 113, 22 Am. Rep. 754.

INSOLVENCY—ATTACHMENT IN ANOTHER STATE.—A creditor who has in another state attached a debt due to his debtor does not, by filing in this state a claim against such debtor in proceedings in insolvency, waive or abandon his attachment lien. The amount he may receive under and by virtue of such lien may be deducted from the amount of his claim, and the balance is the true amount of indebtedness upon which he is entitled to dividends in this state: *Neufelder v. North British etc. Ins. Co.*, 10 Wash. 393, 45 Am. St. Rep. 793, and note.

JACOBSON v. WISCONSIN, MINNESOTA & PACIFIC RAILROAD COMPANY.

[71 MINNESOTA, 519.]

INTERSTATE COMMERCE—JURISDICTION OF STATE AND FEDERAL COURTS—CONNECTING RAILROADS.—Where the putting in of a connecting switch at the intersection of two railroads for the purpose of transferring cars from one road to the other, is of some benefit both to interstate and state traffic, the state and the federal courts have concurrent jurisdiction in the matter, and, in disposing of the case, they may take into consideration the whole necessity resulting from the whole benefit which will accrue to all classes of commerce.

BURDEN OF PROOF—PRESUMPTION.—Where a railroad commission has taken any action under a statute, every presumption is in favor of the action, and the burden is upon the party complaining to show that such action was contrary to law.

RAILROAD COMPANIES—LEGISLATIVE POWER OVER—REASONABLE REGULATION.—The property of a railroad company is dedicated to a public use, and the legislature has the power to regulate that use in a reasonable manner, unless the charter of the railroad company expressly protects it from such regulation. The compelling of intersecting lines to put in a connecting switch is a reasonable regulation.

RAILROAD COMPANIES—INCIDENTAL POWERS.—As incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies.

RAILROAD COMPANIES—LEGISLATIVE POWER OVER. The legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered.

Albert E. Clarke and Wilbur F. Booth, for the appellant.

H. W. Childs and George B. Edgerton, for the respondent.

• **526 CANTY, J.** The Willmar & Sioux Falls Railroad extends from Willmar, in this state, in a southwesterly direction, to Sioux Falls, in South Dakota, and is crossed nearly at right angles by the Wisconsin, Minnesota & Pacific Railroad, near Hanley Falls, in this state. The former railroad is a part of the Great Northern system of railroads, and the latter is operated in connection with the Minneapolis & St. Louis Railway, and as a part of the same. The crossing near Hanley Falls is a grade crossing, and there has never been any switch connecting the two railroads at that point.

Chapter 10 of the Laws of 1887, as amended by chapter 91 of the Laws of 1895, provides:

“Sec. 3. (A) That all common carriers subject to the provisions of this act shall provide, at all points of connection, crossing, or intersection at grade where it is practicable and neces-

sary for the interest of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or track may connect with, cross, or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers, property, and cars to and from their several lines and those of other common carriers connecting therewith."

The act further provides that, on the application of any person interested, the state railroad and warehouse commission shall order connections to be made at such crossings, and this is conceded by appellants. The commission did so order in this case after notice, and a hearing had in the manner provided by the statute. Both railroad companies appealed to the district court from the order. On hearing had in the district court, the order was affirmed, and the connection ordered to be made by a curved switch, seven hundred and seventy-eight and six-tenths feet long, and particularly described, just as the commission had ordered. ⁵²⁷ From the judgment of the district court entered thereon, both railroad companies appeal to this court. The Wisconsin, Minnesota & Pacific Railroad Company has appeared and filed a brief, but the other appellant has not argued the case or filed any brief.

The connecting switch will, at the middle of the same, extend outside of the right of way of each and either railroad, and it will be necessary to condemn at that place a narrow strip of land, a few hundred feet long, for the use of the switch. One of the lines of the Great Northern system extends from Duluth southwest to Willmar. Another extends from St. Paul and Minneapolis west to Willmar. These two lines pass through large areas of wood land, the timber on which is available for fuel and fence posts. Southwest of Willmar, and for many miles in all directions around Hanley Falls, the country is mostly prairie. Timber is scarce, and great quantities of cordwood and fence posts are brought down on the Willmar & Sioux Falls Railroad from said timbered regions and distributed along that road. Timber is not so plentiful along the Minneapolis & St. Louis system. For that reason cordwood and fence posts are much dearer at the stations on the Wisconsin, Minnesota & Pacific Railroad, east and west of Hanley Falls, than such wood is at that station and the stations north and south of it on the Willmar & Sioux Falls

Railroad. For this reason it is for the benefit of the people in the territory tributary to the Wisconsin, Minnesota & Pacific Railroad, but not tributary to Hanley Falls, that this connection should be made, so as to enable them to have cars of wood transferred at that point from the Willmar & Sioux Falls Railroad to the Wisconsin, Minnesota & Pacific Railroad, and distributed at the stations along the latter road. But this will deprive the Wisconsin, Minnesota & Pacific Railroad Company of the benefit of a much longer haul on dearer wood. The loss of revenue which will result to it by reason thereof is one of the grounds of its complaint here.

A large number of cattle are raised in the territory tributary to the Wisconsin, Minnesota & Pacific Railroad west of Hanley Falls. For such of these cattle as are fat enough for beef, Minneapolis and St. Paul are the best market, but, for the stockers and feeders, ⁵²⁸ Sioux City or Omaha is the best market. But there is no way of reaching Sioux City or Omaha with cars of stock shipped from said territory over said last-named road, except by running the cars first to Hopkins, within eight miles of Minneapolis, and then transferring them to another railroad with which the Minneapolis & St. Louis Railway Company has traffic arrangements, and running the cars over such other road to Sioux City or Omaha. The distance from Hanley Falls to Sioux City by this route is three hundred and eighty miles, while the distance from Hanley Falls to Sioux City over the Willmar & Sioux Falls Railroad is but one hundred and eighty-one miles. Making the connection in question will deprive the Wisconsin, Minnesota & Pacific Railroad Company of the benefit of such longer haul on such stockers and feeders, and the loss of revenue which will result to it by reason thereof is another ground of complaint.

1. Appellant Wisconsin, Minnesota & Pacific Railroad Company contends that, as the shipping of stock to Sioux City and Omaha is interstate commerce, the state tribunals have no jurisdiction over it, and must not take into consideration the question of transferring of cars of such stock when determining the necessity of a connection at this crossing.

Conceding, without deciding, that the state tribunals would have no jurisdiction to require the making of this connection for the sole purpose of transferring cars engaged solely in the carrying of interstate commerce, it does not follow that these tribunals may not take into consideration the benefit to such commerce also, when determining the necessity of this connection.

The whole traffic to be benefited by the making of the connection may be amply sufficient to justify requiring the same to be made; yet the part of such traffic commencing and ending in the state may not be sufficient when taken alone, and the part which consists of interstate commerce may not be sufficient when taken alone. If appellant's position is correct, neither the state tribunals nor the federal tribunals would have jurisdiction in such a case. Clearly, such is not the law. In such a case, jurisdiction is concurrent. If there is some necessity resulting from the benefit which will accrue to exclusively state commerce by reason of the putting in of the connection, this gives the state tribunals jurisdiction: *Munn v. Illinois*, 94 U. S. 113, 126; ⁵²⁹ and, in disposing of the case, they may take into consideration the whole necessity resulting from the whole benefit which will accrue to all classes of commerce.

But, even if this position was not correct, there is, in our opinion, ample evidence in this case of necessity resulting from the benefit which will accrue to exclusively state commerce, when considered alone, to justify the ordering of the connection in question.

We will go further. Under the statute, every presumption is in favor of the action of the commission, and the burden was upon appellant to show that such action was contrary to law: See *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353. Appellant has totally failed to maintain that burden. No evidence at all was offered by appellant in the district court as to the want of necessity for the making of this connection, but it rested its case wholly on the evidence of the witnesses called in behalf of the petitioner. That evidence was not in appellant's favor, and certainly did not show conclusively that there was no necessity for this crossing.

2. Appellant further contends that said act of the legislature is unconstitutional and void, and the judgment entered in this case is erroneous, because they contravene numerous provisions both of the state and federal constitutions. Said law and judgment require appellant to exercise the power of eminent domain, construct a railroad track, operate the same, and exchange business with intersecting roads; and it is contended that all of this is outside of and beyond what its charter requires, and that, therefore, the law impairs the obligation of the charter contract between appellant and the state, deprives appellant of the equal protection of the laws, takes its private property without just compensation, deprives it of the right to contract with reference to its own business, et cetera.

All of these constitutional objections may be considered together. These two railroads are public highways, and all of these objections amount simply to this: It is wholly foreign to the purpose of two public highways of the same character to require them to connect where they cross each other, so that public traffic may pass from the one to the other. And, where a private corporation has been chartered to construct, maintain, and operate such public highway, with the right to charge reasonable compensation for its services in ⁵³⁰ so doing, it is a violation of its charter to compel it to connect its highway with another intersecting highway of the same character, unless the right to require the connection is expressly reserved in the charter. We cannot so hold.

If appellant's position is correct, it has the constitutional right to completely isolate its railroad at any time by cutting it off from all connection with other railroads, unless the right to compel connections is expressly reserved in its charter. Its road commences at the village of Morton, in this state (an unimportant station at the terminus of a branch of the Minneapolis & St. Louis Railway), and extends westerly to Watertown, in South Dakota; so that it may at any time, and in spite of all public authority, be very completely isolated and cut off from all large commercial centers, if appellant sees fit so to cut it off. The legislature chartered appellant to construct, maintain, and operate a public highway, not a cul de sac, or something worse, which has no connection with like highways either at its ends or sides. A railroad is an improved highway, on which certain modern appliances are used. It will not, as a general rule, serve fully the purposes for which it was intended, unless the connections between it and other like highways which cross or touch it are improved in like manner, and the same modern appliances are used in passing from one road to the other over those connections.

Again, why is not the doctrine advanced by appellant a two-edged sword? If the legislature cannot compel the making of such connections, because there is nothing in the charter expressly authorizing or requiring the making of them, why is it not ultra vires under such a charter, and without express legislative authority, to make such connections voluntarily? But who will contend that a railroad company may not, without express authority, and as incidental to its general powers, connect its tracks with the tracks of other railroads that extend to its road at its ends, or intersect it at its sides?

Appellant's property is dedicated to public use, "is affected with a public interest," and the legislature certainly has the power to regulate that use in a reasonable manner, unless appellant's charter expressly protects it from such regulation: See *Munn v. Illinois*, 94 ⁵³¹ U. S. 113, 126; *State v. Wabash etc. Ry. Co.*, 83 Mo. 144; *Allnutt v. Inglis*, 12 East, 527; Lord Hale's Treatise "De Jure Maris," 1 Harg. Law Tracts, 6.

Appellant was chartered to serve the public, within the scope of its charter powers and franchises, in the best and most efficient manner possible. It was not, as it seems to contend, chartered to obstruct public traffic or serve the public the least that self-interest might dictate. Appellant cannot be allowed to obstruct the course of public traffic under the claim that, by putting in this connection and letting such traffic take its course, appellant will lose a large amount of revenue which it would otherwise earn. If, by reason of putting in the connection, its revenues will be so reduced that it will not, on its whole business, receive a reasonable compensation for its services, its remedy is by a readjustment of the whole or such part of its schedule of rates and fares as, under the circumstances, ought to be readjusted in order to enable it to earn such reasonable compensation.

It is contended that, even if the connections were made, neither railway company could be compelled to deliver its loaded cars to the other, to be carried with their contents to their destination over the road of such other; that to compel appellant to deliver up its cars to be carried away from the line of its road to distant points would be in violation of its charter contract, and unconstitutional; that for this reason it is useless to compel the making of the connection in question, and therefore the legislative act fails of its purpose, and is unconstitutional and void.

Such interchange of cars between different railroads is a common and almost universal practice; yet there are few railroad charters which expressly authorize this practice. It would hardly be contended that such an act of interchange is ultra vires on the part of a railroad company whose charter is silent as to such authority. As incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies, and this is the ordinary and usual way of going business. We are clearly of the opinion that the legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such

interchange of cars as incidental to the ⁵³² business for which the company was chartered. The supreme court of Iowa reached the same conclusion in *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477. See, also, *Atchison etc. R. R. Co. v. Denver etc. R. R. Co.*, 110 U. S. 667; *Peoria etc. Ry. Co. v. Chicago etc. Ry. Co.*, 109 Ill. 135, 50 Am. Rep. 605; *Michigan v. Smithson*, 45 Mich. 212; *State v. Wabash etc. Ry. Co.*, 83 Mo. 144.

The statute provides: "In the event of that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, . . . it shall be the duty of the railroad and warehouse commission of this state . . . to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this state, and to prescribe the reasonable rules under which any such cars so transferred shall be returned": Laws 1895, c. 91, sec. 3 (C).

Appellant suggests that cases may arise where it would be compelled to deliver its cars to another carrier, who is insolvent, or where the couplings, air-brakes, or other appliances of the cars of one of the carriers will not match with those of the other, and where it would be unsafe to haul such other cars. It is only necessary to say that such cases can be disposed of when they arise. There is no suggestion that this is any such case. Appellant seems to contend that this statute attempts to make the two or more railroad companies partners for the purposes of such a through shipment; that it attempts to compel the making of a joint shipping contract, by which each company will be liable for all the defaults of the others in the through shipment; and that, therefore, the statute is unconstitutional and void. The statute merely provides that, in case all the railroad companies concerned in the through shipment fail to fix a reasonable total sum for the total haul, the commission shall do so for them. There is nothing in this which requires any company to assume any liability beyond its own line for the acts of others in making the haul.

There is nothing in the suggestion that the two appellants are competing roads, within the terms of subdivision F of section 3 of said statute, at least as far as regards the traffic for which the connection in question is required. This disposes of the case, and the judgment appealed from is affirmed.

RAILROAD COMPANIES—LEGISLATIVE POWER OVER.—
The franchises of a railroad corporation are granted for the public

good, and in exercising them the corporation is largely subject to the control and discretion of the legislature. The legislature may, by statute, require a railway corporation to operate a public ferry which constitutes part of its line, although such operation has become unprofitable: *Brownell v. Old Colony R. R. Co.*, 164 Mass. 29, 49 Am. St. Rep. 442. The legislature may, by general laws, impose new burdens on railroad companies in addition to those imposed by their charters, when such burdens are conducive to the public interests and safety: *Nelson v. Vermont etc. R. R. Co.*, 28 Vt. 717, 62 Am. Dec. 614. See, also, *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329.

RAILROAD COMPANIES—LEGISLATIVE POWER OVER—INTERSTATE COMMERCE.—Where a state statute required railroads connecting with railroads outside the state to transfer freight and passengers at a point within the state, it was held that the statute was void as in conflict with the constitution of the United State, giving to Congress the power to regulate commerce among the states: *Council Bluffs v. Kansas etc. R. R. Co.*, 45 Iowa, 338, 24 Am. Rep. 773. See the note to *People v. Wemple*, 27 Am. St. Rep. 567, 568.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

MUNRO v. CALLAHAN.

[55 NEBRASKA, 75.]

JUDGMENTS—RELIEF IN EQUITY.—If a judgment is based upon perjured evidence of a successful party given at the trial, while the defeated party has a good defense which he was prevented from presenting by reason of such perjury, and without being guilty of negligence has exhausted all his ordinary legal remedies for vacating such judgment, equity, in a proper proceeding, may vacate the judgment and grant the defeated party a new trial.

JUDGMENTS—RELIEF IN EQUITY—FRAUD.—A court of equity cannot vacate a judgment after the term at which it was rendered, and grant the defeated party a new trial for fraud practiced upon him, except when such fraud was practiced in connection with the trial.

JUDGMENTS—RELIEF IN EQUITY—PERJURY—MISTAKE.—A court of equity cannot vacate a judgment on account of any innocent mistake or want of recollection on the part of the successful party or his witnesses, nor even on account of the perjury of other witnesses in the case.

J. F. Cromelien and W. F. Gurley, for the appellants.

J. H. Van Dusen and W. S. Summers, for the appellee.

⁷⁶ **RAGAN, C.** June 25, 1892, on the complaint of Delia A. Callahan, George F. Munro was by the district court of Douglas county adjudged to be the father of the former's illegitimate child. From this judgment Munro prosecuted a proceeding in error to this court, which affirmed the judgment of the district court: *Munro v. Callahan*, 41 Neb. 849. Subsequently, on December 6, 1894, Munro filed a petition in the district court of Douglas county against Callahan, reciting the record and pro-

ceedings of the former suit, and alleging, among other things, that Callahan had procured said judgment by committing willful and corrupt perjury on the trial of that case, and prayed the court to set such judgment aside, and to grant him, Munro, a new trial. The district court, on hearing the action, set aside the former judgment and granted Munro a new trial, from which order Callahan has appealed. The bill of exceptions containing the evidence offered on the trial of this case in the district court has been quashed, and the sole question for our determination is whether the pleadings in this case will support the decree rendered therein.

“ 1. To the petition filed by Munro on December 6, 1894, an answer was filed on the 15th of said month, and subsequently, on the 17th, an amended petition was filed. The record does not disclose that an answer was filed to this amended petition, but the case seems to have been tried on the amended petition. The decree recites that the case was heard upon the pleadings filed by the parties and upon the evidence, and counsel for the appellant have addressed their arguments to the sufficiency of the allegations of the amended petition. We shall, therefore, only inquire whether the allegations of the amended petition will support the decree under review. This amended petition, among other things, alleged: “Plaintiff further charges that said verdict so rendered in said action was obtained on the false, fraudulent, and perjured testimony of the said Delia A. Callahan; that said Delia A. Callahan on the said trial testified that the bastard child, of which she charged this plaintiff as being the father, was conceived on Easter Sunday, March 29, 1891, between the hours of 2 and 5 o'clock of the afternoon of said day; that said testimony was false and fraudulent; and said Delia A. Callahan, at the time of giving the same, well knew it so to be. Plaintiff alleges the fact to be that on the said Easter Sunday he did not see the said Delia A. Callahan. . . . Plaintiff further charges the fact to be that while he well knew that the said Delia A. Callahan had testified falsely on said trial, yet he did not, at the time, know where he could obtain the testimony to show that the said Delia A. Callahan had sworn falsely for the purpose of obtaining an unjust verdict against him; that he had no knowledge of where he could obtain the witnesses who knew and would testify that said Delia A. Callahan had sworn falsely in said action at law until long after the time had expired for filing a motion for a new trial in said cause; that this plaintiff now has such testimony and will produce the same in court.” Since the

bill of exceptions has been quashed the judgment is to be considered as if ⁷⁸ it had been rendered by default, or on the district court's overruling a demurrer interposed to the amended petition by Callahan. In addition to certain special findings the tenth finding of the district court is as follows: "The court further finds that the general equities are with the plaintiff." We take it that within this general finding are included findings that Munro had a prima facie defense to the action brought against him by Callahan; that the defeat suffered by him in that action was not the result of any negligence or laches on his part; and that he had diligently pursued and exhausted all ordinary legal remedies provided by statute for obtaining a new trial of said action and for the vacation of said judgment. We think the petition sufficient to support these findings, as it sets out, in addition to what we have quoted, the filing by Miss Callahan in the district court of the complaint against Munro charging him with being the father of her illegitimate child; that he pleaded not guilty of such charge; was tried to a jury and found guilty; his filing of a motion for a new trial; the overruling of such motion; the judgment upon the verdict of the jury; the error proceeding to this court and the affirmance of the judgment of the district court.

2. Assuming that the general finding of the district court includes the finding that the judgment obtained by Miss Callahan against Munro was procured by her willful perjury, is the petition in that respect sufficient to support the finding? Is it good against a demurrer? When the nature of the case in which that judgment is rendered is considered, when it is remembered that the only issue in that case was whether Munro was guilty of being the father of Callahan's illegitimate child, that without her positive and unequivocal testimony that he was her child's father, she could not have procured the judgment she did, and that she, and she alone, could positively and certainly know who was the father of her child, we think the petition sufficient. In other words, from the very nature of the case, a finding that one is the ⁷⁹ father of a bastard child rests, and must rest, where the issue is litigated, upon the testimony of the mother; and if this testimony is false and perjured, then a judgment based on such a finding is one procured by fraud practiced by the successful party. Section 602 of the Code of Civil Procedure provides that a district court shall have power to vacate a judgment rendered by it, after the term at which it was rendered, for fraud practiced by the successful party in obtaining

the judgment. Certainly, the obtaining of a judgment by willful and corrupt perjury is obtaining it by fraud within the meaning of this section of the code. But this statute is merely a legislative adoption of the doctrine of the equity courts in force when it was enacted. Long before this code was enacted the setting aside of a judgment procured by the fraud of the successful party and the granting the defeated party a new trial were jurisdictions possessed and enforced by the courts of equity when it appeared that the defeated party had a valid defense which he had been prevented by the fraud of the successful party from making out, and where he had been guilty of no negligence or laches and had exhausted all his ordinary legal remedies for obtaining a vacation of such judgment: 3 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1364; 2 Freeman on Judgments, 4th ed., sec. 489. Whether, then, this action is based on section 602 of the Code of Civil Procedure, or whether it be regarded as an independent suit in equity, the jurisdiction and authority of the district court to grant Munro a new trial of the law action are undoubted.

The cases are not numerous in which a judgment has been vacated and the defeated party granted a new trial on the ground that the judgment was obtained by the perjury of the successful party; but this is perhaps because, from the very nature of the case, the existence of the fraud or perjury could not be established otherwise than by trying anew the issue tried and determined in the action in which the new trial is sought; and neither ^{so} the equity rule nor the code authorizes the vacation of a judgment after the term at which it was rendered and the granting a defeated party a new trial for fraud practiced upon him, save where the fraud was practiced in connection with the trial.

In *Laithe v. McDonald*, 12 Kan. 340, Laithe brought an action against McDonald for a failure to deliver goods which he charged were received by McDonald as a common carrier and lost through his negligence. McDonald answered by a general denial and did not appear further in the case. On the trial Laithe willfully, corruptly, and falsely swore that McDonald was a common carrier; had received the goods in that capacity and failed to deliver them; and that they were worth something over five thousand dollars, for which sum he obtained a judgment. The supreme court of Kansas affirmed a judgment of the district court vacating the judgment in the law action on the ground that Laithe obtained it by fraud, the fraud consisting

of his perjury. The court held that a defendant was not entitled to have a judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff or his witnesses, nor even on account of the perjury of other witnesses in the case, but said that no party was bound to anticipate or suppose that the other party would commit willful and corrupt perjury, and that no party was bound to the exercise of extraordinary diligence in preparing to meet such perjury. It will be observed that in the case cited the judgment rested entirely upon the perjured testimony of Laithe, just as, in the case at bar, the judgment that Munro was the father of Callahan's illegitimate child depended entirely for support upon Callahan's evidence that he was the father of her child.

In *Graver v. Faurot*, 76 Fed. Rep. 257, the complainant brought a suit in equity, in a state court, in which he charged two defendants with fraudulently inducing him to purchase some worthless shares of corporate stock, and, in accordance with the old chancery practice, he ⁸¹ required the parties made defendants to answer certain allegations or interrogatories in the bill under oath. The parties made defendants answered. The answers were false and perjured, and the complainant suffered a defeat. He subsequently discovered that the answers made by the defendants were false, and then brought suit to vacate the judgment, and the court held that the making of the false answers was a positive and actual fraud which vitiated the decree. Here again the judgment complained of rested entirely upon the perjured testimony of the two defendants in whose favor the judgment was rendered. For a further discussion of the subject of the power of a court of equity to vacate a judgment obtained by fraud practiced by the successful party at the trial of the case in which it was rendered, see *United States v. Throckmorton*, 98 U. S. 61; *Ward v. Southfield*, 102 N. Y. 293; *Asbury v. Frisz*, 148 Ind. 513.

Our conclusion therefore is, that the petition charges that Miss Callahan procured a judgment determining that Munro was the father of her illegitimate child; that she obtained such judgment by her own false and perjured testimony, and that this was a fraud practiced by her in and about the trial; and, from the nature of the case, the judgment rests solely upon her evidence and the petition sustains the decree of the district court vacating that judgment, and such decree is accordingly affirmed.

Irvine, C., expresses no opinion.

JUDGMENTS—RELIEF IN EQUITY.—Relief from a judgment will be decreed in equity, upon there appearing any fact clearly proving that it is against conscience to execute the judgment, and that the injured party could not have availed himself of this fact in the court of law, or if he could have so availed himself, that he was prevented from doing so by fraud or accident, unmixed with any fault or negligence in himself or his agents: *Handley v. Jackson*, 31 Or. 552, 65 Am. St. Rep. 839. See the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218-261.

JUDGMENTS—RELIEF IN EQUITY—FRAUD.—Equity has jurisdiction to set aside a former judgment or decree for perjury or fraud only in those cases where the perjury or fraud consists of extrinsic, collateral acts, not examined and determined in the former action: *Friese v. Hummel*, 26 Or. 145, 46 Am. St. Rep. 610.

JUDGMENTS—RELIEF IN EQUITY—PERJURY.—The rule established by the weight of authority is that a court of equity will not set aside a judgment at law because it was founded on a fraudulent instrument or perjured testimony, nor for any matter that was actually presented and considered in the judgment assailed: *Camp v. Ward*, 69 Vt. 286, 60 Am. St. Rep. 929, and note; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, and monographic note thereto. Perjury may, however, be considered in connection with other circumstances tending to disclose a fraudulent scheme on the part of one party to put it out of the power of the other party to defend the action: *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420.

GERMAN NATIONAL BANK v. KAUTTER.

[55 NEBRASKA, 103.]

ATTACHMENT—JUDGMENT BY CONSTRUCTIVE SERVICE—ATTACK UPON.—If plaintiff in attachment seizes a resident's property as that of a nonresident, and sells it under a judgment rendered upon constructive service, the judgment defendant may, in the absence of an appearance in that suit, attack such judgment in a subsequent suit by him, wherein the attachment plaintiff invokes such judgment as a defense, and show that it is void for the reason that at the time of the inception of the attachment suit and judgment he was a resident of the state and then therein. This may be done although the record in the attachment suit is regular on its face.

ATTACHMENT—FALSE AFFIDAVIT.—An attachment based on a false affidavit of the nonresidence of the debtor is void.

Boehmer & Rummons and Abbott, Selleck & Lane, for the appellants.

Norval Brothers, D. C. McKillip, and J. C. Johnston, for the appellee.

¹⁰⁴ HARRISON, C. J. In the petition filed in this action, commenced for Ernest Bolse in the district court of Seward county, it was pleaded that on February 27, 1889, he executed

and delivered to John Kautter a promissory note in the sum of \$1,138.36, payable April 1, 1894, and he and his wife as security for the payment of the note, at the same time executed and delivered to the said party a mortgage on certain land in Seward county, Nebraska; that thereafter the note was by the payee indorsed and transferred to the German National Bank of Lincoln; that the petitioner paid at various dates the sums of interest due on the note, and on May 3, 1894, paid to the bank the whole amount of principal and interest then due and received from it the note and mortgage, the note marked paid with a stamp then in use by the bank for cancellation of paid instruments of indebtedness; that the pleader had offered and tendered payment of the fees and expenses of the execution, et cetera, of a release of the mortgage, but had been by the bank and other parties apparently interested in the matter refused the satisfaction or release. He impleaded with the bank John Kautter, Henry Schwake, George F. H. Schwake, George T. Meier, and Frank A. Boehmer, as each having or asserting an interest in the note and mortgage as assignee, purchaser, or pledgee ¹⁰⁵ thereof, or otherwise. He also stated that he had sold the land described in the mortgage and could not complete the sale by reason of the nonrelease of the mortgage. He prayed that the parties named be ordered to release the mortgage of record or that it be decreed canceled. All the defendants except Kautter filed a joint answer, in which they disclaimed any interest in or to the real estate described in the petition or to the stated mortgage thereon.

For Kautter an answer was filed, and subsequently an answer and cross-petition: His first answer was, during the course of the proceedings, on motion of some of the parties to the action, stricken from the files. In the answer and cross-petition Kautter both admitted and pleaded affirmatively the execution, et cetera, of the note and mortgage referred to in the petition; also admitted that the mortgage was unreleased of record. It was further pleaded in such cross-petition that the note and mortgage were by Kautter delivered to the bank as collateral security for the payment of his indebtedness thereto. This was for moneys loaned to him at different times, in the aggregate \$238. That at some date in the month of March or April, 1891, he gave to the bank a promissory note for the total sum of the loans, due three months after date, and the bank retained the collaterals, and, soon after, he went to the state of Kansas to attend to some business; that he was not again at the bank

until June, 1893, at which time he asked to settle his indebtedness and that he receive the Bolse note and mortgage and the bank account for the interest, if any, collected thereon. (The interest on the Bolse note was payable annually.) He was then informed by the bank that the Bolse note and mortgage had been sold and the proceeds of the sale applied in payment of the indebtedness—the \$238. He further pleaded that on or about December 9, 1891, the bank made a pretended sale and transfer of the note and mortgage; that the same was done with the intent to cheat and defraud him and to wrongfully and fraudulently deprive ¹⁰⁰ him of his interest in the note and mortgage; that Frank A. Boehmer, Henry Schwake, George F. H. Schwake, and George T. Meier, who each during the life of the mortgage had appeared of record as an assignee and apparent purchaser thereof, had none of them paid any consideration for the note and mortgage, but had figured as such purchasers pursuant to an agreement and intent to aid the bank in its fraudulent purpose relative to the pleader's rights in the instruments apparently transferred. He alleged further that if Bolse had paid the amount due on the note for \$1,138.36 to the bank, it was done with a full knowledge of Kautter's continued interest or right thereto and therein, and also of the sale by the bank of the note and mortgage and its purpose with which it made the transfer. The prayer of the cross-petition was that the amount due on the note and mortgage might be ascertained, and after a deduction therefrom of the sum of the pleader's indebtedness to the bank, the balance be adjudged a first lien against the land described in the petition in the action; that if it should appear that the money due on the note and mortgage had been paid to the bank, a judgment be accorded the cross-petitioner against the bank for the amount his due, and also against any other of defendants who were shown to have participated with the bank in the wrongful and fraudulent purposes and acts relative to the rights of the pleader.

To the extent the rights of Ernest Bolse, the original plaintiff, were involved, the issues were tried and determined and the cause was continued. Time was asked by and allowed to the bank and others, against whom the cross-petition declared and demanded affirmative relief, to answer its allegations. The bank, in answer to the cross-petition, admitted the creation and existence of the note and mortgage by Bolse in favor of the cross-petitioner and alleged that the latter, on March 16, 1890, executed and delivered to the bank a promissory note in the

sum of \$240.75, due June 16, 1890, which was not paid at ¹⁰⁷ its maturity and was unpaid on August 3, 1891; that on the last-mentioned date the bank caused an action to be commenced in the county court of Lancaster county to recover the amount due it, the indebtedness evidenced by the note to which we have last referred, and also caused a writ of attachment to issue in said action on the ground that John Kautter was a nonresident of the state of Nebraska; that the writ of attachment was levied on the note and mortgage of Bolse to the defendant in the attachment suit; that such action proceeded regularly as provided by law to its termination, inclusive of a public sale of the note and mortgage under order of the court and the application of the proceeds to the payment of the note on which the attachment cause was predicated. It was further answered that no proceeding had been had or taken to modify, reverse, change, or annul the adjudication of the county court. Frank A. Boehmer, in answer to the cross-petition, admitted the execution and delivery of the \$1,138.36 note, and its accompanying mortgage by Bolse to Kautter; alleged his purchase thereof in good faith at the sale by the officer, and denied generally all other allegations of such pleading. Henry Schwake, George F. H. Schwake, and George T. Meier each admitted the \$1,138.36 note and mortgage as pleaded, and alleged its bona fide purchase for a valuable consideration, and its ownership for a time; and for further answer denied the other statements of the cross-petition.

For the cross-petitioner there was filed a reply to the answer of the bank, in which it was stated that the bank and the other parties, who, during the life of the \$1,138.36 note, became apparently its owners and holders, and who were either officers or employes of the bank or were of its stockholders, combined or planned to cheat or defraud the cross-petitioner and used the suit by attachment as a means through which to effect the purpose, and thereby procured a sale of the note and mortgage to be made, at which a purchase thereof was effected for the bank for ¹⁰⁸ the sum of \$322, when their value was more than \$1,300; that at the time the attachment suit was begun and during its progress, the pleader was a resident of Seward county, Nebraska, which fact and his whereabouts at the time were well known to the bank and the other parties interested, but they purposely avoided any notice to him of the action, attachment, and sale thereunder, and he had no notice thereof, and that the county court was without jurisdiction to act in the suit.

A jury was waived, and there was a trial of the issues to the

court. The court determined as matters of fact that Kautter borrowed of the bank the sum of \$240.75 on March 16, 1890, and as evidence of the indebtedness so created, executed, and delivered to it a promissory note, also turned over to it the \$1,138.36 note and mortgage as collateral security for the payment of his debt; that several sums at different times were paid by Ernest Bolse to the bank on the mortgage note, and the balance due thereof, \$1,224, was paid May 3, 1894, to the bank; that at the time of the suit and attachment and the pretended sale of the note and mortgage under order of the court in such suit "the said cross-petitioner, John Kautter, was an actual bona fide resident of Seward county, Nebraska, and still resides therein, and that he had no notice whatever of the pendency of said action, and that no notice or summons was served upon him in said action; and the court further finds that said pretended action and attachment, and the pretended sale of said note, was collusive and fraudulent and was made for the purpose of cheating and defrauding said cross-petitioner, John Kautter, out of said note and mortgage."

Judgment was rendered against the bank and George F. H. Schwake for \$1,198.66 and costs, to reverse which is the purpose of the present proceeding in this court.

We deem it proper here to notice some of the facts in connection with the findings of the court relative thereto. There was ample evidence of the fact that the note and mortgage were in the possession of the bank as collateral ¹⁰⁹ security for the payment of the indebtedness of the payee thereof to the bank. Of the testimony relative to the residence of John Kautter, it may be said to have been established that he was an unmarried man and during several years prior to the sale of his farm in Seward county to Bolse, lived thereon; after the sale he kept his trunk, some of his belongings and effects at the house of Frank Thomas, in Seward county, this state; that he had some business interests or affairs in Kansas, and would go there and stay during some months of probably each year; that at one time when in Kansas he voted at a presidential election; that he always returned to Seward county as his home and was there several months of each year, with the exception possibly of one; that at the time of the commencement and pendency of the attachment suit in Lancaster county he was in Seward county. All the facts and attendant circumstances considered, there was sufficient testimony to sustain the finding of the court that the cross-petitioner was a resident of Seward county. There was no

other than constructive service in the attachment suit. There was also testimony in support of a determination that the mortgage note was at the time of its sale in the attachment proceedings of the value of the amount shown on its face. It was also of the testimony that the attorney who commenced and prosecuted the action and attachment for the bank then had the mortgage note in his possession for collection and that it was levied on in his office; that he purchased it at the sale for \$322 and held it thereafter for thirty or sixty days; then, as he states, he needed some money and turned it back to the bank and received of the bank \$322, the same amount he paid for it at the sale. The foregoing statements in relation to the evidence and facts of the case we deem sufficient, except to the extent they may be further noticed in discussion of the points of the arguments made by counsel for the parties.

It is contended for the plaintiffs in error that the demand for relief by the cross-petitioner involves a collateral ¹¹⁰ attack on a domestic judgment or adjudication, the judgment in the attachment suit; and, while it was in form a personal judgment against John Kautter, it must be regarded as but an adjudication by which the property attached was subjected to the payment of the debt in suit, and so considered was authorized if jurisdiction of the res had been obtained. It is of the contention that such an attack is not allowable where the record discloses, as did that of the county court in the attachment suit, the performance of all acts and the existence of all facts necessary to confer jurisdiction and its due exercise; and further, in this connection, that the defendant in error, not having attacked the judgment in the county court in any of the methods, of which there were several afforded him by law, could not be heard to urge its invalidity in the present action. This suit, as instituted by Bolse, directly involved the rights of John Kautter to the note and mortgage and asked that he be deprived thereof, and the reason, if tenable, for the relief against him had its origin in what he asserted in his answer and cross-petition were the wrongful acts of the bank and other parties to the suit in respect to some of the subject matters of the action relative to his rights thereto or therein. In answer to this, such parties pleaded the attachment proceedings and adjudication, and he replied facts to show its invalidity. In this state, where under the code there is but one—a civil—action in which matters which may be denominated legal or equitable may be litigated, the cross-petitioner could be heard in defense to the suit

of Bolse; also in the cross-action against the bank and other parties, to assert and show the invalidity of the adjudication in the attachment suit. It is true that the record of the attachment case, on its face, disclosed that the county court had jurisdiction to proceed as it did; but the affidavit which gave it jurisdiction to entertain the suit, which became one against the thing attached, and not against the person of the debtor—for of the person there was no jurisdiction—contained in the statement, the ¹¹¹ groundwork of the jurisdiction, that the debtor was a nonresident of the state and this was not true. Unless it was a fact his property could not be reached in the suit, and as it was not a fact, the adjudication by which his property was appropriated was void. Whether the debtor would be allowed to assert its invalidity and show the facts not apparent of record in litigation between him and some third person we need not and do not decide, but in a contest between him and the bank, the plaintiff in the attachment suit, we think it was competent and allowable. This view has in its support the argument that when the bank was called to account by the allegations and demands of the cross-petition, it invoked in its aid as a defense the adjudication in the attachment suit, and thus, it may be said, placed such proceedings and adjudication in issue.

The circumstances of this case as to the question now under consideration bring it within the principle of the rule announced by this court in *Eayrs v. Nason*, 54 Neb. 143, wherein it was stated: "1. Though the record in which a judgment is pronounced discloses upon its face that the court had jurisdiction both of the subject matter of the suit and of the parties thereto, still, a party made liable by such a judgment, who has never appeared in the action, and who was never given legal notice of the pendency of such action, may, in a proper proceeding, either as a cause of action or defense, show that the recitals of the record that he was served with the process of the court are false; 2. Suit was brought to foreclose a real estate mortgage, the owner of the equity of redemption of the land involved made defendant thereto, and constructive service had on him by publication, he being at the time a resident of the state and actually present therein. He did not appear in the action personally or by attorney. After the decree the defendant died. Held, that in a suit brought by his heir against the purchaser of the land at the sale under the foreclosure decree, to quiet the heir's title and redeem from the mortgage, ¹¹² that the heir might show that the averments of the affidavit filed to

procure constructive service upon his ancestor, that he was then a nonresident of the state and that service of summons could not be made on him in the state, was false": See also *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *McNeill v. Edie*, 24 Kan. 108; *Norwood v. Cobb*, 15 Tex. 500; *Goudy v. Hall*, 30 Ill. 109; *Carleton v. Bickford*, 13 Gray, 591, 74 Am. Dec. 652; *Needham v. Thayer*, 147 Mass. 536; *Dozier v. Richardson*, 25 Ga. 90.

The ground for the issuance of the writ has no existence and the attachment was wrongful (*Stiff v. Fisher*, 85 Tex. 556; *McLaughlin v. Davis*, 14 Kan. 168; *Connelly v. Woods*, 31 Kan. 359; *Mayer v. Zingre*, 18 Neb. 458), and afforded no forceful defense for the bank against Kautter's demand for his collaterals or the value thereof.

It is urged that the cross-petition was insufficient and the relief afforded was not warranted or supported by the pleading of the prayer thereof. The cross-petition was not the subject of an attack for insufficiency of allegations until at the time of the trial. The question was raised by a demurrer *ore tenus*. It was also of the subject matter of the motion for a new trial. The cross-petition, we think, was sufficient in its allegation to warrant the relief given, especially construed favorably as is the rule when the demurrer is delayed, as was this, until the inception of the introduction of evidence. There are some other points made in argument for plaintiffs in error which refer to the admission of evidence. The trial was to the court without a jury. That improper evidence was admitted is not in and of itself ground for reversal. There was evidence to sustain the findings of the court: *Tolerton v. McClure*, 45 Neb. 368.

It is also asserted that the trial court erred in allowing a designated line of interrogatories to be asked of two of the witnesses during their cross-examination. There were but few objections interposed to any portions of the cross-examination to which this complaint refers, and the ¹¹³ testimony elicited by the questions to which objections were made was either immaterial or, for other reasons, wholly without prejudice to the rights of the complainants.

It is argued that it was error to allow F. C. Thomas and Frank Thomas to testify on rebuttal in regard to the place of residence of John Kautter. Of this argument it may be said that Frank Thomas was not called and did not testify in rebuttal. When F. C. Thomas was called to testify in rebuttal, there was no objection that it would be improper that he should give testimony at that stage of the trial, nor was his testimony

objected to as a whole. Of a few questions asked of him it was made of record that they called for improper rebuttal testimony, and the court was asked to reject it, but the testimony allowed to be given in such instances was either immaterial or nonprejudicial; hence the assignments are without force.

Of the judgment as against the plaintiff in error, George F. H. Schwake, we must say that it is, in our view of the cause, without proof to sustain it. Anything he did was in his capacity as employé of the bank and not personally, unless it was his purchase of the note and mortgage, and we do not believe from the evidence that this portion of the affair was of such a nature as to render him personally liable to the cross-petitioner. The judgment against the bank is affirmed, and as to George F. H. Schwake it is reversed.

Judgment accordingly.

Norval, J., offered no opinion.

ATTACHMENT PROCEEDINGS AGAINST NONRESIDENTS are regulated and governed by statute, and such statutory provisions must be strictly adhered to: Note to Mudge v. Steinhart, 12 Am. St. Rep. 22.

ATTACHMENT—FALSE AFFIDAVIT.—If an attachment is procured by the plaintiff's filing an affidavit that the debt upon which he sues is not secured, and a bond is given to release property from a levy made under such attachment, the obligors in the bond may successfully resist the action against them thereon by establishing the falsity of such affidavit: Murphy v. Montandon, 2 Idaho, 1048, 35 Am. St. Rep. 279.

BROWN v. BOSE.

[55 NEBRASKA, 200.]

ATTACHMENT SALES—TITLE OF PURCHASER—COLLATERAL ATTACK.—A purchaser at execution sale of the real property of a nonresident defendant taken under attachment acquires a title not subject to collateral attack in another action, although the publication of notice preceding the judgment in the attachment proceeding was irregular and might have been attacked therein.

C. F. Tuttle, W. D. Beckett, and D. F. Hayden, for the appellants.

J. C. Watson, for the appellees.

²⁰⁰ RYAN, C. This was an action of ejectment in which there was final judgment in favor of the defendants in the dis-

strict court of Otoe county. The trial was to the court without a jury, and the correctness of its conclusion depends upon a single question, which is presented by the following facts: Previous to March 14, 1890, the real property in controversy was owned by the ancestor of the plaintiffs in error. On that day there were two petitions and other proper showings for an attachment, which issued against said owner of the real property in dispute in as many actions. The attachment defendant, at the time of all the transactions herein referred to, was a nonresident of this state. The levies of the writs of attachment were made respectively, on March 20, ²⁰¹ 1890, and March 25, 1890. The publications of notice to the nonresident defendant were made March 14, March 21, March 28, April 4 and April 11, 1890. By stipulation on the trial of this case it was admitted that the two above-mentioned actions were begun against the defendant Brown to cause to be sold the premises in dispute for the payment of debts owing by him; that said property was purchased at sheriff's sale, and that through the purchaser at said sale the defendant in the district court, as an innocent purchaser, derived his title, under which, at the time of the commencement of the action, he was in possession. The contention of plaintiffs in error is, that no publication could properly be made of the notice to the nonresident defendant until after a levy of attachment; that after such levy there were not four publications of the notice, and consequently the court, at the time it directed a sale of the property, had no jurisdiction to order a sale thereof, from which premises it is argued that the sale pursuant to such order was not effective to vest title.

In *Darnell v. Mack*, 46 Neb. 740, this exact question was not involved, but arguendo there were cited several cases in support of the proposition that jurisdiction to order a sale depends upon the lawful seizure of the property, and that subsequent defects may render the judgment erroneous, but not void. We have again examined these cases and find that they sustain the proposition in support of which they were cited: *Cooper v. Reynolds*, 10 Wall. 308; *Paine v. Mooreland*, 15 Ohio 435, 45 Am. Dec. 585; *In re Clark*, 3 Denio, 167; *Beech v. Abbott*, 6 Vt. 586; *Williams v. Stewart*, 3 Wis. 678, *773; *Field v. Dortch*, 34 Ark. 339; *Hardin v. Lee*, 51 Mo. 241. We could add nothing of value by going over the propositions considered in *Darnell v. Mack*, 46 Neb. 740, and hence refrain from any attempts in that direction. The reasoning meets our approval, as applied to the facts of this case, and it is necessary merely to refer to

that reasoning for a discussion of the pivotal question with which we are dealing.

²⁰² The irregularities complained of by plaintiffs in error were of such a nature that, possibly, they might have been available in the actions in which they occurred. They cannot now be invoked to sustain a collateral attack upon the judgments rendered in those actions and upon the proceedings afterward had for the enforcement of said judgments. There is found no error in the record and the judgment of the district court is affirmed.

ATTACHMENT—COLLATERAL ATTACK ON JUDGMENT. A court acquires jurisdiction in attachment by issuing process and attaching the property, and if, after acquiring jurisdiction, it renders judgment without the publication of notice required by law, such judgment is irregular only, and cannot be attacked collaterally, but can only be corrected by writ of error: *Paine v. Mooreland*, 15 Ohio, 435. 45 Am. Dec. 585. But see *German Nat. Bank v. Kautter*, 55 Neb. 103, ante, p. 371, where a judgment against a supposed non-resident was attacked collaterally.

BLOOMFIELD STATE BANK v. MILLER.

[55 NEBRASKA, 243.]

MORTGAGES—DEPOSIT OF TITLE DEEDS.—A mortgage cannot be created by the deposit of title deeds without a writing, as such mortgage is contrary to the statute of frauds and the recording acts.

STATUTE OF FRAUDS.—An exception to the statute of frauds taking out of its operation estates arising by act or operation of law does not include a case where the creation of the estate depends solely upon the intention of the parties to a contract.

STATUTE OF FRAUDS—ORAL CONTRACT.—A court of equity cannot make valid a contract void under the statute of frauds, under pretense of aiding an imperfect attempt to execute a contract.

MORTGAGES—DEPOSIT OF TITLE DEEDS.—A mortgage attempted to be made by the deposit of title deeds cannot be enforced, although the loan secured by such deposit has been actually received by the depositor.

A. A. Welch, for the appellant.

Carter & Brown, for the appellee.

²⁴⁵ IRVINE, C. D. C. Main held a contract with the state for the purchase of the northwest quarter of section 32, township 32 north, of range 3 west, in Knox county, said land being state educational land. He also held a number of leases of

other educational land in the vicinity. In 1892 he entered into contracts with H. N. Miller, which had for their effect the transfer to Miller of Main's rights to the land, payment of the consideration or a part thereof being deferred. The contract first referred to, and out of which this action arises, was assigned to Miller by a separate instrument. January 20, 1893, Miller made his note to the Bloomfield State Bank for five hundred dollars, representing in part an overdraft and in part a loan made at that time by the bank to Miller. At the same time Miller wrote his name on the back of the assignment from Main to himself, and delivered the assignment in that condition to the bank, intending thereby to have it operate as security for the note. Prior thereto he had, by formal written assignments, transferred his rights to the other lands to French, to secure a debt he owed the latter. In April or May, 1893, finding that he would be unable to meet the payments to Main, Miller negotiated for the sale of his rights to Sexton, Comstock & Co. Sexton, Comstock & Co. not being prepared or not desiring to make immediate payment to Main, an arrangement was made among Miller, Main, French, and Sexton, Comstock & Co., evidenced by a preliminary memorandum agreement, **240** two formal contracts, and certain letters. No single contract was joined in by all the parties to the transaction, but the nature of the arrangement is made plain by a comparison of the different documents. Its precise nature is not material; its general object was to procure contracts of purchase in lieu of the leases, to pass all rights eventually to Sexton, Comstock & Co., and to this end that French should pay to Main all moneys accruing to him under his contracts with Miller, obtain the assigned contracts from Main and hold them until Sexton, Comstock & Co. should repay French his advances to Miller and to Main, when he should assign them to Sexton, Comstock & Co. Accordingly, French paid Main what was due him, including the money due on the contract first mentioned. Down to this point neither Main, French, nor Sexton, Comstock & Co. knew of the transactions between Miller and the bank. Learning thereof, Main refused to transfer the contract with the state to French. The bank on its part, learning of the other transactions, wrote above Miller's signature on the assignment an assignment thereof to itself. Then it began this action against Miller, Main, and French, alleging in its petition the debt to the bank and that to secure the payment thereof Miller agreed to assign the contract with Main, that he wrote his name on

the back thereof and delivered it to the bank with authority to fill in above the signature a formal assignment. It prayed a foreclosure. Miller made default. French answered, denying all the material averments of the petition and alleging that, for the purpose of securing title and conveying to Sexton, Comstock & Co. in accordance with his contract obligations, he had bought the land of Main and paid him therefor, all in ignorance of any claim by plaintiff. By way of cross-petition he prayed that Main be required to assign the contract to him. Main in his answer pleaded his good faith and offered to assign to whomsoever the court might determine, and to refund to French what he had paid if the court should so order. ²⁴⁷ The findings were against the plaintiff, and the court ordered a conveyance by Main to French. Plaintiff alone appeals.

By comparing the statement of facts with the issues, it will be seen that neither of the contesting parties succeeded in establishing the facts precisely as he pleaded them. The bank wholly failed to show that it had any authority to write the assignment over Miller's signature, or that the signature was placed there for such a purpose. Even if there had been such authority, the assignment was not written until after French's rights had accrued in his ignorance of the bank's. The bank, therefore, can claim nothing under the written assignment. On the other hand, French pleaded only an assignment from Main. Main had already assigned to Miller, so that under that pleading French could claim only a subrogation to Main's right to the unpaid purchase money, provided the bank had any right derived from Miller, although under the evidence French, or Sexton, Comstock & Co., whom he represented, was shown to have acquired Miller's rights also. If the bank obtained no right, then it cannot complain of the decree between the other parties. If it did obtain any right from Miller, then the decree must at least be modified. The proof showing that the written assignment to the bank was unavailing, but also showing that the contract between Main and Miller was by the latter deposited with the bank with the clear intention on the part of both that it should stand as security for a debt in part then contracted, we have thus distinctly presented for the first time in this state the question whether the doctrine of an equitable mortgage by a deposit of title deeds is sound.

It is unnecessary to review the English cases. When the doctrine was there first announced it provoked much opposition, being justly considered a further invasion of the statute

of frauds. Lord Eldon expressed his emphatic disapproval of it, but considered the rule too well fixed in his time to justify its overthrow. It must therefore ²⁴⁸ be accepted as the established doctrine of the English courts, and as a part of the law of England. The common law is not with us an estate by inheritance, but one by purchase. It is here in force by virtue of statute, which provides: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory" is adopted and declared to be law within said territory: Comp. Stats., c. 15, sec. 1. No one would assert that the phrase "common law" was there used in contradistinction to the rules of equity; it undoubtedly includes the law derived from the English court of chancery. On the other hand, it was not the whole body of the English law which was adopted, but only so much thereof as is applicable (to the nature of our institutions), and is not inconsistent with the constitutions or statutes, past or future. There is certainly nothing in the constitution which conflicts with the doctrine of parol mortgages, but when we examine the statutes the question assumes a different aspect. We have a statute of frauds in the main following the outline of the famous statute of Charles II. By this "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same": Comp. Stat., c. 32, sec. 3. By section 4 of the same chapter, section 3 shall not be construed "to prevent any trust from rising or being extinguished by implication or operation of law." By section 5 every contract for the sale of lands or any interest in lands shall be void unless the contract or some note or memorandum be in writing and signed by the party by whom the sale is made. By section 22 the term "estate ²⁴⁹ and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent. The language of these sections is so clear that it would be immediately conclusive against the theory of parol liens, were it not for the fact that much of the language is taken from the English statute, which, in spite of its plain provisions, the English courts

straightway set themselves to evade and fritter away by a process of misconstruction as systematic as it was ingenious. For years the mischief of that policy has been realized and the danger of further pursuing it has been by most courts carefully avoided. The spirit of the statute should certainly be preserved so far as possible. Its purpose and policy, no doubt, is to prevent the creation or transfer of estates in or liens upon lands, except by writing definite and complete in its terms. To enforce a mortgage created by the mere deposit of title deeds is in the plainest violation of such purpose and policy. It directly offends the very letter of the law.

Again, in this state we have created by statute a system whereby conveyances, including mortgages, must be registered in a public office. The purpose of this system is to afford security to titles by a public record which parties dealing with land may, and for their own protection must, examine, and on which they may rely. Secret transfers and liens are sought thereby to be prevented. A mortgage by deposit of title deeds tends to defeat this purpose. The recording acts have another bearing on the question. In England title deeds followed the land. The evidence of title lay not only in the delivery of a deed, but in its continued possession by the grantee. When, therefore, the owner parted with his muniments of title he parted with the means of disposing of the land. When the deposit was by way of pledge, the pledgee, by his manual possession of the deeds, had the effective power to prevent an untoward disposition of the land, either such as would defraud him or such as would defraud ²⁵⁰ others ignorant of his rights. But under our system it is not usual to consult or even to inquire about the original conveyances. They have performed their chief office when they have been recorded. Thenceforth the records become the practical evidence of title. By a deposit of the deeds the pledgee does not obtain that effective control over the thing pledged which is essential to such a security when not evidenced by writing, whether that thing be real or personal.

For the reasons above stated this court has held that the vendor of land, who delivers to his vendee a deed absolute, does not retain a lien thereon for the unpaid purchase money: *Edminster v. Higgins*, 6 Neb. 265; *Ansley v. Pasahro*, 22 Neb. 662. In *Folsom v. McCague*, 29 Neb. 124, Judge Norval, speaking of an assignment of a land contract where the place for the vendee's name was left blank, said: "To make a valid assignment

of these contracts, it was as necessary to have an assignee as it was the signature of the assignor. Until some one's name was filled in these blanks as assignee the appellees appeared to be and were the real owners. . . . These assignments of the contracts in blank were in violation of the statute of frauds and void." While none of these cases is decisive of that before us, they all recognize the principles already stated. We would, in the absence of authority elsewhere, say without hesitation that the doctrine of equitable mortgages by the deposit of title deeds, although a part of the law of England, is not here applicable, is contrary to our statutes, and was, therefore, not adopted by the legislature of the territory. This conclusion is reinforced by an examination of the decisions in other states, where by custom or by statute the common law has been acquired. For some or all of the reasons suggested the doctrine has been repudiated in the following cases: *Probasco v. Johnson*, 2 Disn. 96; *Lehman v. Collins*, 69 Ala. 127; *Bower v. Oyster*, 3 Penr. & W. 239; *Vanmeter v. McFaddin*, 8 B. Mon. 435; *Bicknell v. Bicknell*, 31 Vt. 498; *Meador v. Meador*, 3 Heisk. 562; *Gothard v. Flynn*, 25 Miss. 58.

²⁵¹ While the courts of many states have to some extent intimated an adherence to the English rule, it has always been on a citation of the English cases, without any discussion on principle of the objections to the enforcement of that rule in this country. Moreover, these cases are by no means so formidable as their bare citation in digests and text-books would indicate. New York invariably leads the list of states in these compilations, and the first case cited is *Jackson v. Dunlap*, 1 Johns. Cas. 114, 1 Am. Dec. 100. There land had been sold; the deed had not been delivered, but was retained by the grantor as security for the purchase money. Four judges held that there had been no delivery and that title had never passed. Kent alone thought that title had passed, but that an equitable mortgage had been created. He does not discuss the question and his opinion was a dissent, but the case is cited as upholding the English rule. *Jackson v. Parkhurst*, 4 Wend. 369, merely holds that an equitable mortgage is not available as a defense in ejectment. The validity of such a mortgage for other purposes was not involved in the case. *Rockwell v. Hobby*, 2 Sand. Ch. 10, was a case where a son had paid his mother's mortgage and retained an unrecorded deed to her. It was there held that the retention of the deed made an equitable mortgage, but the case loses force from the further holding that, independently

of the deed, the son was subrogated to the rights of the mortgagee whom he had paid. *Chase v. Peck*, 21 N. Y. 581, was a case of a deed absolute; the remarks about deposits of title deeds were obiter.

In New Jersey a very peculiar thing has occurred. *Griffin v. Griffin*, 18 N. J. Eq. 104, was a bill to compel the defendant to surrender to plaintiff deeds to plaintiff's ancestor of land in New York. It appeared that they had been deposited as security. The court, citing the New York cases we have mentioned, took them as indicating that such a deposit operated in New York as a mortgage, and therefore very properly refused to decree ²⁵² their surrender, without any reference to the New Jersey law on the subject. But in *Gale v. Morris*, 29 N. J. Eq. 222, the court announced the English rule as in force in New Jersey and cited *Griffin v. Griffin*, 18 N. J. Eq. 104, and also *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679, a case where the doctrine was not involved, but mentioned by way of remote illustration of a general equitable principle. Moreover, even *Gale v. Morris*, 29 N. J. Eq. 222, did not require a decision of the question. That was a suit to reform a mortgage on a life estate so as to embrace the fee; the mistake as between the parties was admitted, and the issue was whether a subsequent mortgagee was charged with notice so that the reformation could cut him out as to the reversion.

Hackett v. Reynolds, 4 R. I. 512, enforces such a mortgage in a hard case, with the preliminary observation that the fraudulent design of the debtors was so transparent "that a court of equity would be disposed to find or to make a way to thwart them." From a peculiarly apologetic tone in the opinion it is evident that the court realized that it was making a way.

Hutzler v. Phillips, 26 S. C. 136, 4 Am. St. Rep. 687, often cited as sustaining the rule, holds distinctly that the case was not within it. There was a dissent to the intimation that the rule might be in force.

The following cases, frequently cited, will be found on investigation to involve no such question, and the remarks of the judges on the subject either to be obiter or made for the purpose of excluding the question from the case: *Mowry v. Wood*, 12 Wis. (*413) 460; *Jarvis v. Dutcher*, 16 Wis. (*307) 326; *Abbott v. Godfroy*, 1 Mich. 179; *Peckham v. Haddock*, 36 Ill. 38; *Roberts v. Richards*, 36 Ill. 339; *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43; *Hall v. McDuff*, 24 Me. 311; *Wright v. Troutman*, 81 Ill. 374.

Williams v. Stratton, 10 Smedes & M. 418, says: "Such a mortgage is in direct opposition to the statute of frauds, in regard to which we have said that we will create no exceptions not found in the statute."

²⁵³ Mandeville v. Welch, 5 Wheat. 277, does not sustain the doctrine. Judge Story merely says in that case: "It may be admitted that according to the course of the authorities in England, and as applicable to the state of land titles there," a deposit of title deeds creates a mortgage. Whatever inference might be drawn from that language as to the position of the supreme court of the United States is dispelled by the emphatic words of Justice Campbell in Williams v. Hill, 19 How. 246: "Nor can the real property conveyed in the deed be retained as security for advances or debts subsequently made, on the strength of a parol engagement."

The case of First Nat. Bank v. Caldwell, 4 Dill. 314, is entitled to more than passing consideration, not only from the eminent ability of the judge who decided it, but as being a case from this federal district and to which the law of Nebraska was applicable. There certain railroad coupons were held as a pledge. They were exchangeable for land, and, by arrangement of the debtor and creditor, they were exchanged, land contracts being issued in the name of the debtor but delivered to the creditor. The court held that the pledgee had a lien superior to that of a judgment creditor. Judge Dillon, however, declined to pass on the question whether a lien could be created by the mere deposit of title deeds. The fact that there they stood in lieu of coupons held in perfect pledge was the controlling fact in his mind. Giving, however, due weight to his apparent opinion in favor of the English rule, we do not feel that we can adopt it in the face of what seems to us the overwhelming reason and weight of authority against it.

The plaintiff argues that so far as the reasons urged for denying the lien are founded on the statute of frauds they are of no force, because our statute excepts from its operation estates arising by act or operation of law. This phrase occurs twice in the statute—once in section 3, already quoted, and again in section 4, with reference to trusts: Comp. Stats., c. 32. The phrase is ²⁵⁴ twice found in the statute of 29 Charles II, chapter 3, and in the same connection; in section 3 in very similar words to our section 3; in section 8 with regard to trusts. Section 8 of the English statute excepts trusts arising by implication or construction of law and extinguishments or transfers by act or

operation of law, while our section 4 excepts trusts arising or extinguished by implication or operation of law. It is manifest from the closeness of context that the phrase was used in our statute in the English sense. We have not found any exact definition thereof. Chancellor Kent, in *Simonds v. Catlin*, Cole. & C. Cas. 346, said: "These words are strictly technical, and refer to certain definite estates, such as those by curtesy and dower and those created by remittitur." In *Bouvier's Law Dictionary* it is said that the term indicates the manner in which a party acquires rights without any act of his own. There can be no doubt that parliament intended no more than these statements imply, at least in the third section of the statute. In the eighth section trusts were involved, and the object of the exception seems to have been to avoid the destruction of the ingenious method of conveyancing derived from the doctrine of trusts and the construction which had been placed on the statute of uses, and to preserve resulting and constructive trusts. Whatever may have been the precise idea in the legislative mind, it is clear that the exception was not meant to give effect to contracts which the parties had failed to express in the form required by the statute. Such an interpretation would render the exception wholly destructive of the statute. Yet it requires that interpretation to bring this case within the exception. The lien here arises if at all solely from the contract of the parties. It is not a result flowing by law independent of their contract or even derivative from any valid contract which they made.

Finally, it is insisted that a court of equity will enforce the lien as the result of an imperfect attempt to ²⁵⁵ create a legal mortgage. Certain California cases are cited in support of the argument. The power of equity is frequently asserted to reform instruments and to compel their execution under certain circumstances. But neither the petition nor the evidence presents a case for the reformation of an instrument or the specific performance of a contract. There is not made out, as suggested, a case for the specific performance of an oral contract on the ground of part performance. The plaintiff has not altered its position except by paying the consideration, and that alone is not such a part performance as will take a case out of the statute of frauds. Moreover, there was no contract to specifically enforce. Miller did not promise to execute a mortgage. He indorsed the contract and delivered it, which was all that his contract contemplated. Nothing more could be required, at least where the rights of third persons have intervened. In no

way can the bank be given any relief except by giving effect to a transaction which the law has denounced as void.

Affirmed.

MORTGAGES—DEPOSIT OF TITLE DEEDS.—Where title deeds are deposited as present security, and with intent thereby to create a lien upon the land therein conveyed, an equitable mortgage is created, notwithstanding the statute of frauds. But an equitable mortgage is not created by the deposit of title deeds in pursuance of a parol agreement to make a mortgage: *Hutzler v. Phillips*, 26 S. C. 136, 4 Am. St. Rep. 687, and especially see the monographic note thereto.

STATUTE OF FRAUDS—PAROL AGREEMENT—COURTS OF EQUITY.—Equity will at all times lend its aid to defeat fraud, notwithstanding the statute of frauds: *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696. But no case can be found where a contract has been taken out of the statute in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement: See the note to *Ryan v. Dox*, 90 Am. Dec. 709.

UNITED STATES NATIONAL BANK v. GEER.

[55 NEBRASKA, 462.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT—EVIDENCE.—If commercial paper is indorsed in blank, parol evidence is admissible to show that the terms of the agreement between the parties are other and different from those which arise by presumption of law.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—EVIDENCE.—A restrictive indorsement to commercial paper unambiguous in its terms, cannot be contradicted or explained by parol evidence.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—EVIDENCE.—A certificate of deposit indorsed for collection for the account of the indorser is a restrictive indorsement which vests no general property in the paper in the indorsee, but makes him merely a collection agent; and parol evidence is not admissible to show that the transfer of the title was intended to be absolute.

J. C. Cowin and W. D. McHugh, for the appellant.

O. H. Scott and Cobb & Harvey, for the appellee.

463 **NORVAL and SULLIVAN, JJ.** At the last term of this court a decision was entered in this case reversing the judgment of the trial court. Upon a proper application a rehearing was granted, and the cause has been a second time submitted for our consideration. The issues involved and the essential

facts of the case are stated with sufficient accuracy in the former decision reported in *United States Nat. Bank v. Geer*, 53 Neb. 67. In reversing the judgment below we proceeded upon the theory that the form of the indorsement of the certificate of deposit was ambiguous and not conclusive as to the intentions of the parties; that it was permissible to show by parol evidence the exact nature of the contract, and that the only inference to be drawn from the proofs established a sale of the draft and not a bailment for collection. A careful re-examination of the record and questions thereby presented, assisted by the able argument of counsel, has convinced us that the former decision was erroneous. In the opinion it was said: "Whatever may be the law elsewhere, it is the law of this state that as between the immediate parties the true relationship may be shown, notwithstanding the form or terms of the indorsement itself": Citing *Roberts v. Snow*, 27 Neb. 425; *Dusenbury v. Albright*, 31 Neb. 345; *Salisbury v. First Nat. Bank*, 37 Neb. 872, 40 Am. St. Rep. 527; *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733; *Corbett v. Fetzer*, 47 Neb. 269. The adjudications of this court do not warrant the statement of the rule as broadly as above indicated, nor do the decisions elsewhere support such a doctrine. The general rule is, and it has been frequently asserted by this court, that the terms of a written contract cannot be contradicted, varied, or explained by parol evidence of a prior or contemporaneous oral agreement between the parties: *Hamilton v. Thrall*, 7 Neb. 210; *Dodge v. Kiene*, 28 Neb. 216; *Watson v. Roode*, 30 Neb. 264; *Kaserman v. Fries*, 33 Neb. 427; *Mattison v. Chicago etc. R. R. Co.*, 42 Neb. 545; *Clarke v. Kelsey*, 41 Neb. 766; *Maxwell v. Burr*, 44 ⁴⁶⁴ Neb. 31; *Commercial State Bank v. Antelope County*, 48 Neb. 496; *Waddle v. Owen*, 43 Neb. 489; *Nebraska Exposition Assn. v. Townley*, 46 Neb. 893. It is true this court has more than once decided that when the rights of bona fide purchasers of negotiable paper for value before maturity are not involved, it is competent to show by parol evidence, in cases of indorsement in blank of such paper, that the terms of the agreement between the parties were other and different from those which arise by presumption of law: *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733; *Corbett v. Fetzer*, 47 Neb. 269. The principle underlying these cases does not contravene the general rule, recognized and applied by this and other courts, that parol contemporaneous evidence cannot be received to contradict or vary the terms of a written

instrument, for the obvious reason that the contract of a blank indorsement is not expressed in writing, but rests in legal implications, and this prima facie presumption of law may be overthrown, as between the original parties to such an indorsement, by the admission of competent parol evidence establishing the real terms of the agreement. If the law conclusively presumed the liability created by an indorsement in blank of commercial paper, then, of course, the actual terms of the contract would not be a proper subject of inquiry, and neither party would be permitted to show by parol the true agreement. But the presumption of liability arising from such an indorsement is prima facie merely, and not conclusive; hence, as against all except bona fide holders for value, the true terms of the contract may be shown by evidence resting in parol. The indorsement of the Hebron bank on the certificate of deposit involved herein was an express written contract, not open to contradiction or explanation by proof of extrinsic facts, and conclusively proves an agency merely, and that the title and ownership of the paper never passed to the Capital National Bank. This doctrine is sustained by an unbroken line of authorities.

In *First Nat. Bank v. Reno County Bank*, 3 ⁴⁶⁵ Fed. Rep. 257, it was distinctly decided that an indorsement of a bill of exchange directing the drawee to pay to another "on account of" the indorser, or "for collection," is a restrictive indorsement carrying with it notice that the indorser did not thereby part with title to the paper or to its proceeds when collected. To the same effect are *Beal v. Somerville*, 50 Fed. Rep. 647; *Hoffman v. First Nat. Bank*, 46 N. J. L. 605; *Cecil Bank v. Farmers Bank*, 22 Md. 148; 1 *Morse on Banks and Banking*, sec. 217; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Sweeny v. Easter*, 1 Wall. 166; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561, 40 Am. Rep. 261; *White v. Miners Nat. Bank*, 102 U. S. 658.

Leary v. Blanchard, 48 Me. 269, was an action upon a promissory note indorsed by the payee, "Pay to Arthur Leary, or order, for account of the Atlas Mutual Insurance Co." It was ruled that the indorsement was restrictive and parol evidence was inadmissible to show that the transfer was absolute.

A draft bore the following indorsement: "Pay Penn Bank, or order, for account of People's Bank, McKeesport, Pa. C. R. Stuckslager, Cashier. D. Gardner, As. Cash." This indorsement was before the court for consideration in *Freeman's Nat.*

Bank v. National Tube Works Co., 151 Mass. 413, 21 Am. St. Rep. 461, and it was held to be restrictive for collection, merely giving notice that the title and ownership of the paper had not passed from the indorser.

Third Nat. Bank v. Clark, 23 Minn. 263, was an action on a promissory note made payable to the order of the Williams Mower & Reaper Company and indorsed by the payee to the Third National Bank of Syracuse, or order, for collection. It was adjudicated in that case that the indorsement was restrictive and that parol evidence was not admissible to prove it absolute: Rock County Nat. Bank v. Hollister, 21 Minn. 385.

In Armour Bros. Banking Co. v. Riley County Bank, 30 Kan. 163, there was involved the scope and effect of the ⁴⁶⁶ following indorsement on a draft: "Pay W. H. Wynants, Esq., Cashier, or order, for account of the Riley County Bank of Manhattan, Kansas. J. K. Winchip, Cashier." Parol evidence was offered to contradict the indorsement, which, upon objection, was excluded by the trial court. Brewer, J., in delivering the opinion of the court on review, used this language: "The ruling of the district court was founded upon the idea that this indorsement is a restrictive indorsement, defining the rights and title of the indorsee, and not open to contradiction or explanation by parol testimony. In other words, this indorsement is a written contract, conclusive as against any parol testimony, and which shows absolutely that the plaintiff was not the owner, the real property in interest, but only held the draft as agent, and for the purposes of collection. That this is a restrictive indorsement, and that it operated to transfer the draft to the plaintiff only as agent for purposes of collection, cannot be doubted: Byles on Bills, 152; 1 Daniel on Negotiable Instruments, sec. 698; Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429, and cases cited in the opinion. In this latter case, speaking of an indorsement almost identical with the one at bar, the court says: 'The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent.' And again: 'The words are notice that the restricted indorsee has no property in the bill.' It will be perceived that this is not a mere blank indorsement, but one in which the contract is written out in full, and, therefore, like any other written contract, not to be contradicted or varied by parol evidence: Greenleaf on Evidence, secs. 277, 281, 282; 1 Daniel on Negotiable Instruments, sec. 717; so that upon the

face of the paper it appears affirmatively that the plaintiff is not the owner, but only an agent for collection."

No case has come within the range of our vision which is in conflict with the adjudications already mentioned, nor is it believed that any decision can be found which lends support to the doctrine that it is competent to ⁴⁶⁷ prove, in case of a restrictive indorsement like the one before us, that the actual contract was different from the one expressed in writing on the back of the certificate of deposit.

It is argued by counsel for plaintiff in error that the contractual rights of the parties are not expressed in the indorsement in question; that the law infers a contract therefrom. We quote from the brief: "When one writes upon the back of a negotiable instrument 'pay to the order of A. B., for account of,' and signs it, his contract is not set forth in the writing. His obligations under this indorsement, and the rights and duties of the indorsee under this enforcement, are not in anywise set forth in the indorsement. It is not a written contract stating the mutual rights and obligations of the parties. The law merchant in the case of this indorsement, as in the case of one in blank, infers from the indorsement a certain contract, and it is this inferred contract which the law enforces when it holds the signer to the usual obligations. From a restrictive indorsement the law infers a certain contract. From an unrestricted indorsement the law infers a certain other contract. In both cases, it must be clear the contract is inferred, and in no sense written." In this contention counsel are in error. This indorsement, in unequivocal language, shows that the title to the paper, except for the purposes of collection, was to remain in the Hebron bank, and that the indorsee, the Capital National Bank, was agent merely for collection. The rights of the parties, under this indorsement, do not rest upon any implication of law, but are determined by the contract of the parties as expressed in the indorsement. And to permit oral evidence to be received to show the agreement was different from that indicated by the language used would be in violation of the principle that a written contract may not be varied by parol. The same result would be reached whether the indorsement be regarded the entire contract or said indorsement and letter transmitting the certificate of deposit be construed ⁴⁶⁸ together. The letter of transmittal states that the certificate was "for collection and credit." These words clearly indicate that the transmission was for the purpose of collection, and when collected

the proceeds were to be credited to the transmitting bank. Until the collection was made the relation of debtor and creditor was not to exist. To hold otherwise would disregard the meaning of the word "collection." In *Branch v. United States Nat. Bank*, 50 Neb. 470, it was decided that the legal title of commercial paper indorsed "for collection" rests in the indorsee only to the extent of authorizing him to demand and enforce payment, and that the true owner of the paper so indorsed may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent.

The written contract is unambiguous, and it is unnecessary to resort to parol evidence to ascertain the true intention of the parties. An explicit written agreement cannot be contradicted or qualified by proof of any usage, custom, or course of dealing, while proof thereof is permissible in cases of doubt where the contract is expressed in vague and ambiguous language. The indorsement in question and the letter of transmittal, neither singly nor when considered together, show that the Hebron bank was divested of its title to the certificate of deposit in question. This is conceded by counsel for plaintiff in error, but they rely upon the prior course of dealing and the acts and conduct of the parties to overthrow the plain and unambiguous written contract of the parties and to establish a transfer of title to the paper. As we have seen, evidence of such matters is not admissible. The fact that the Hebron bank repeatedly sent remittances to the Capital National Bank, the paper containing restrictive indorsements the same as this, and from time to time drew against its remittances and was allowed interest from the Capital National Bank on its average balances, is insufficient to establish that the transfer of this paper was absolute: *Scott v. Ocean Bank*, 23 N. Y. 289; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46.

⁴⁶⁹ Upon principle and authority we are fully persuaded that the court below did not err in finding that the Hebron bank never parted with its title to this certificate of deposit. The judgment of reversal entered herein is vacated, and the judgment of the district court is affirmed.

MR. CHIEF JUSTICE HARRISON AND JUSTICES RYAN AND IRVINE dissented and adhered to their former opinion, and Mr. Justice Irvine, who wrote the dissenting opinion, in the course of his remarks, said that: "To show that the reasons for allowing extrinsic evidence, as between the parties, apply as well to restrictive as to general indorsements, the following language from

Dye v. Scott, 35 Ohio St. 194, 35 Am. Rep. 604, which has been quoted with approval by this court in *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733, is pertinent: 'If there was a contemporaneous contract between the parties upon which the indorsement was made, both reason and justice require that, as between themselves, the actual and not the presumed contract should be enforced; and, as between them, oral testimony should be admissible to prove the contemporaneous contract. This will not necessarily, or even probably, impair currency or credit of the instrument as commercial paper. Prior parties to it will not be affected, nor will the rights of subsequent indorseees without notice be impaired or limited in any degree.'

NEGOTIABLE INSTRUMENTS—INDORSEMENTS—PAROL EVIDENCE TO VARY.—The authorities seem to be divided upon the question whether parol evidence is admissible to vary the legal effect of an indorsement by showing an agreement, contemporaneously made, varying the liability created by law. That parol evidence is not admissible, see *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 60 Am. St. Rep. 719, and note. The rule in the principal case, that parol evidence is admissible, is supported by *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246, and note; *Cook v. Brown*, 62 Mich. 473, 4 Am. St. Rep. 870. Some courts seem to draw the distinction that as between the parties to a negotiable instrument parol evidence is admissible, but where the instrument has been transferred, before due, to a bona fide holder in the due course of business, a blank indorsement establishes a liability which cannot be varied by parol evidence: *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733, and note. A restrictive indorsement, such as an indorsement "without recourse," creates an express and complete contract, which cannot be varied or contradicted by parol evidence of a contemporaneous agreement: *Youngberg v. Nelson*, 51 Minn. 172, 38 Am. St. Rep. 497, and note.

NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION.—An indorsement for collection does not pass the title or the right to the proceeds of the property, but it makes the indorsee a collecting agent or trustee of the holder: *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99, 32 Am. St. Rep. 332, and note; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524, 54 Am. St. Rep. 59.

CERTIFICATE OF DEPOSIT.—PAROL EVIDENCE cannot be introduced to explain or vary a certificate of deposit: *Bickley v. Commercial Bank*, 39 S. C. 281, 39 Am. St. Rep. 721.

WEHN v. FALL.

[55 NEBRASKA, 547.]

JUDGMENTS—LIEN OF—VENDOR AND VENDEE—APPLICATION OF PAYMENTS.—A judgment against a vendor of land, who retains the legal title under a contract of sale, attaches as a lien to such land, and, as against the vendee in possession with actual notice, may be enforced to the extent of the unpaid purchase money.

JUDGMENTS—LIEN OF—VENDOR AND VENDEE—APPLICATION OF PAYMENTS.—The mere docketing of a judgment against the vendor of land is not notice of the lien to a purchaser in possession under a contract of sale, and payments subsequently made by him to the judgment debtor, pursuant to the contract, without actual notice of the judgment, are valid as against its lien upon the land.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—COUNTERCLAIM.—In an action by a stockholder of an insolvent corporation to enjoin an execution sale of real estate which has been purchased by him from the members of a firm against whom the defendant has recovered the judgment on which the execution issued, an answer charging that all the stockholders of such corporation are liable for the payment of the debt on which the judgment is based and asking that they be brought in and required to pay does not set up a counterclaim.

CORPORATIONS—INSOLVENCY—LIEN OF CREDITOR ON ASSETS.—A creditor of an insolvent corporation does not acquire any specific lien on its assets, and cannot proceed against one having possession of such assets without first reducing his claim to judgment.

CORPORATIONS—INSOLVENCY—CREDITORS of an insolvent corporation must first obtain judgment on their claims before attempting to reach property transferred by the corporation in fraud of their rights.

CORPORATIONS—INSOLVENCY—RIGHTS OF CREDITORS—LIABILITY OF STOCKHOLDERS.—A creditor of an insolvent and dissolved corporation must first exhaust his legal remedy against it, before he can sue to obtain satisfaction of his claim against a stockholder who has come into possession of corporate assets.

Hainer & Smith, for the appellants.

A. W. Agee and H. M. Kellogg, for the appellee.

548 SULLIVAN, J. In January, 1888, the Phillips Building & Loan Association drew a check on the Bank of Phillips in favor of Samuel Spanogle for four hundred and ninety-five dollars. Spanogle indorsed the check to Jerome H. Smith, who deposited it for collection with the First National Bank of Aurora. In due time the Aurora bank presented it for payment to the Phillips bank, which, being then unable to meet its obligations, was compelled to refuse payment. Smith thereupon sued John Fonner, A. J. Spanogle, Samuel Spanogle, and

Charles L. Crane, as members of the firm of John Fonner & Co. and owners of the Bank of Phillips. This suit ripened into a judgment in the district court of Hamilton county on the twelfth day of February, 1889. On January ⁵⁴⁹ 30, 1888, the firm of John Fonner & Co. suspended its banking business at Phillips and turned over its entire assets to Chris Schlotfeldt, of Grand Island, with written authority to sell the same and apply the proceeds in payment of the partnership indebtedness. Schlotfeldt accepted the trust or agency, and, on March 9, 1888, contracted with the plaintiff, John W. Wehn, Jr., to sell him the real estate in controversy, being a town lot in the village of Phillips, in Hamilton county. Wehn was given immediate possession of the property, but did not obtain a deed therefor nor pay any part of the purchase price until after Smith had recovered his judgment against the members of the firm of John Fonner & Co. Upon this judgment an execution was issued, and Fall, as sheriff of Hamilton county, was proceeding thereunder to sell the real estate in question when this action was commenced to enjoin the sale. A temporary injunction was granted and on the final hearing made perpetual.

It is first insisted on behalf of the appellants that the instrument executed by John Fonner & Co. was an irregular assignment and of no validity. Whether or not it was intended as an assignment is quite immaterial. Between the parties to the transaction it was valid. It conferred on Schlotfeldt power to take possession of the assets of the bank and sell the same. Consequently, the contract made with Wehn for the sale of the lot in Phillips was within the scope of his authority and was a binding contract. It thus appears that Wehn was a purchaser of the lot and in possession of the same without having paid any part of the purchase price when Smith's judgment attached as a lien. Under these circumstances, Smith became entitled to intercept the purchase money and have the same applied in satisfaction of his judgment upon giving Wehn notice of his rights. It is not claimed that there was any actual notice, and constructive notice from the docketing of the judgment, we think, was not sufficient. In *Courtney v. Parker*, 16 Neb. 311, it is said: "Where a judgment is recovered against one who has ⁵⁵⁰ agreed to sell land, but made no deed nor received the whole of the purchase money, it is a lien on the vendor's interest in the land, and a purchaser under the judgment is entitled to the money remaining unpaid." Neither the question of notice or possession was considered in that case. In *Olander*

v. Tighe, 43 Neb. 344, the rule on this subject is stated in the syllabus as follows: A judgment recovered in the district court against the vendor of land which is situate in the county in and for which the court is held, who has not, at the time of the recovery of the judgment, executed and delivered a deed for the land or received all the purchase money, is a lien upon the interest of the vendor in the land, viz., the unpaid purchase money; and a levy of an execution issued upon such judgment on the land, and a sale thereunder, will pass to the purchaser the interest of the vendor." In this case it was held that the rights of the judgment creditor were superior to the rights of a vendee in possession who had paid a portion of the purchase price after the recovery of the judgment; but it does not appear from the statement of facts that the purchaser was without actual notice, and the question of notice is not considered or discussed. The question was, however, very thoroughly considered in the case of Filley v. Duncan, 1 Neb. 134, 93 Am. Dec. 337, and the conclusion reached that while a judgment recovered against the vendor of lands is a lien to the extent of the unpaid purchase price due from the vendee in possession, "the entry of such judgment will not, of itself, compel the vendee in possession under contract to make subsequent payments to the creditor." Discussing this question, Mr. Freeman, in his work on Judgments, fourth edition, section 364, says: "While it is everywhere conceded that a judgment lien accruing against a vendor after the making of the contract of sale extends to all his interest remaining in the land, and entitles the purchaser at the sale to all sums still to be paid by the vendee, yet it is well settled that the latter, if in possession of the lands sold, is not bound to ascertain, before making each payment, ⁵⁵¹ that no judgment has been obtained against his vendor. Whoever takes and keeps possession of land, by these acts of ownership gives such notice of his rights to the whole world that no one can safely assume to act in ignorance of them. He is so far exempted from the operation of the registry acts that a deed made by his grantor can in no event prejudice his interests; and so far exempted from the operation of the law charging all persons with notice of the lien arising from the docketing of a judgment that such docketing, while he is in possession of the land, is not notice to him of the charge thereby created on the purchase money remaining unpaid. He may, therefore, from time to time, pay to this vendor such sums as fall due; and he will always be entitled to the benefit of such payments, unless

it can be shown that they were made with actual knowledge of a lien on the vendor's interest in the land. This construction of the law seems to have been dictated by a consideration of the hardship to be inflicted on the vendee in possession by establishing a different rule." In support of the rule thus announced the author cites *Filley v. Duncan*, 1 Neb. 134, 93 Am. Dec. 337; *Parks v. Jackson*, 11 Wend. 442, 25 Am. Dec. 656; *Moyer v. Hinman*, 13 N. Y. 180; *Hampson v. Edelen*, 2 Har. & J. 64, 3 Am. Dec. 530. No case is cited as holding a contrary doctrine. In section 438 of 1 Black on Judgments it is said: "At any rate, it appears to be well settled that the docketing of the judgment is not notice of the lien to the purchaser in possession, since, after he has taken his contract for the purchase, he is not bound to keep the run of the dockets; and payments subsequently made by him to the judgment debtor, pursuant to the contract, without actual notice of the judgment, are valid as against its lien upon the land": See, also, to the same effect, 12 Am. & Eng. Ency. of Law, 1st ed., 113.

There is another question in the case. The appellant Smith in his answer alleged that the Phillips Building & Loan Association was indebted to him as drawer of the check on which his judgment against the members of the ⁵⁵² firm of John Fonner & Co. is based; that said association has dissolved and divided its entire assets among the stockholders; that Wehn and a number of other persons named in the answer were stockholders at the time of the dissolution and received some portion of the corporate property. There was a prayer that the persons alleged to be stockholders be made parties to the action and required to pay the amount due on the check. Proceedings were afterward had in the case which resulted in a trial of issues formed by said stockholders pleading to the matters contained in Smith's answer. The findings and judgment of the court were in favor of the stockholders. The only question presented for decision by the petition was whether Smith's judgment was a lien on Wehn's real estate. The primary and controlling question presented by the answer was whether the loan association was under a contractual liability as drawer of the check. Between these questions there was no such legal relationship as to justify their trial in the same action. But the court having tried them together and found in favor of the stockholders, we will inquire whether the conclusion reached on the merits was correct. The assets of a corporation, which, of course, includes unpaid stock subscriptions, constitute a fund to which creditors

may resort for the satisfaction of their claims. But to reach assets in the hands of stockholder creditors must pursue the remedy prescribed by law. By section 4, article 11 (miscellaneous corporations), of our constitution it is provided: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." Of this provision of the constitution it was said by Ragan, C., delivering the opinion of the court in *Globe Pub. Co. v. State Bank*, 41 Neb. 175: "We think, therefore, that the ⁵⁵³ creditors of a de jure corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until an execution issued upon such judgment has been returned wholly or in part unsatisfied." But it is contended that the constitutional provision above quoted is not applicable to this case, for the reason that, the corporation being insolvent and having ceased to exist, the recovery of a judgment against it was neither necessary nor possible. A creditor of an insolvent corporation does not acquire any specific lien on its assets, and no sufficient reason is perceived for holding that he may proceed against one having possession of such assets without first reducing his claim to judgment. The reason for the rule which requires the creditors of an insolvent individual to obtain judgment on their claims before attempting to reach property transferred by him in fraud of their rights seems to be entirely applicable where the debtor is an insolvent corporation against which a suit may be maintained: *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371. There was in this case no impediment in the way of a suit against the corporation. Section 68 of chapter 16 of the Compiled Statutes of 1897 provides for the bringing of actions against dissolved corporations, and makes ample provision for the service of process upon them. What we conceive to be the correct rule on this subject is stated in 3 Thompson on Private Corporations, section 3355, as follows: "Where the ordinary theory of equitable remedies prevails, under which it is necessary, before resorting to a court of equity, for the complainant to exhaust his remedies in a legal forum, the mere insolvency of the corporation does not dispense with the necessity of a creditor reducing his demand to a judgment at law against it before bringing a suit in equity to charge its shareholders.

Nor will it be any excuse for not obtaining such a judgment at law that the charter has expired by limitation, providing the law governing the corporation is such that this fact does not prevent the ⁵⁵⁴ obtaining of a judgment at law against it. . . . As has been said in a leading case, a judgment can no more be recovered against a dead corporation than against a dead man. But according to the usual theory, a de facto dissolution of a corporation, which consists usually in a permanent suspension of its business and abandonment of its franchises, by reason of insolvency, is no obstruction to obtaining a judgment at law against it, and therefore does not relieve the creditor of the necessity of obtaining such a judgment before applying for equitable relief." A recent case decided on facts almost identical with those in the case before us and fully sustaining Judge Thompson's statement of the rule is *Lamar v. Allison*, 101 Ga. 270. See, also, *Swan Land etc. Co. v. Frank*, 39 Fed. Rep. 456. Our conclusion is, that the answer of Smith did not state a cause of action against the stockholders of the Phillips Building & Loan Association, and the entire judgment of the district court is, therefore, affirmed.

JUDGMENTS—LIEN—VENDOR AND VENDEE.—A vendor's interest in lands contracted to be sold is bound by the lien of a judgment recovered against him while the contract is unexecuted, to the extent to which it is unexecuted: *Kinports v. Boynton*, 120 Pa. St. 306, 6 Am. St. Rep. 706. A judgment creditor has no lien upon purchase money due to the judgment debtor for lands sold by him and which are subject to the judgment lien: *Blakemore v. Wise*, 95 Va. 269, 64 Am. St. Rep. 781, and note; monographic note to *Filley v. Duncan*, 93 Am. Dec. 353.

CORPORATIONS—INSOLVENCY—RIGHTS OF CREDITORS. The creditors of a corporation have no lien upon its assets as a trust fund held for their benefit: *Ames v. Heslet*, 19 Mont. 188, 61 Am. St. Rep. 496. As between a corporation and its creditors, it does not hold its property in trust, or subject to a lien in favor of creditors, in any other sense than does an individual debtor: *First Nat. Bank v. Dovetail etc. Co.*, 143 Ind. 550, 52 Am. St. Rep. 435.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—RIGHTS OF CREDITORS.—The authorities are divided upon the question whether the liability of a stockholder is primary, or whether it is subject to proceedings first taken against the corporation: Monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 850, where the opposing authorities are collected. That the stockholder's liability is primary, see *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rp. 149. In Ohio, it is held that where a corporation continues to do business, a creditor must first obtain judgment against it before he can proceed against the stockholder. But where the corporation has become wholly insolvent, and has ceased to do business, and has made an assignment of its property for the benefit of its creditors, a creditor may proceed directly and primarily against the stockholder: *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, and note.

LATIMER v. STATE.

[55 NEBRASKA 609.]

CRIMINAL LAW—PRELIMINARY EXAMINATION—WAIVER.—If a person accused of crime, on being arrested and brought before an examining magistrate, voluntarily pleads guilty, he thereby waives his right to a preliminary examination.

CRIMINAL LAW—PRELIMINARY EXAMINATION:—DISTRICT COURTS ARE WITHOUT JURISDICTION to try, on information, one accused of crime, except he be a fugitive from justice, unless he has first been accorded the privilege of a preliminary examination or has waived that privilege.

CRIMINAL LAW.—A PRELIMINARY EXAMINATION is in no sense a trial of a person accused of crime. It is not even necessary that the person charged with a crime, on being brought before a magistrate, should be asked to plead, or that he should plead.

CRIMINAL LAW—PRELIMINARY EXAMINATION.—The object of a preliminary examination is to ascertain whether the crime charged has been committed, and, if so, whether there is probable cause to believe that the accused committed it.

CRIMINAL LAW.—A PRELIMINARY EXAMINATION is a right accorded and a privilege granted by law to everyone accused of crime, but it is a privilege which the accused may waive.

CRIMINAL LAW—PRELIMINARY EXAMINATION—RECOGNIZANCE.—If an accused, on being brought before the examining magistrate, waives his right to a preliminary examination, or pleads guilty to the crime with which he is charged, the magistrate should recognize him to appear in the district court, and enter upon his docket the proceedings that actually occur, and a duly certified transcript of this record filed in the office of the clerk of the district court invests that court with jurisdiction to try the accused on information for the crime with which he was accused before the examining magistrate.

CRIMINAL LAW—DRUNKENNESS AS DEFENSE.—While voluntary intoxication is not of itself a complete defense for one who is charged with the commission of an offense, yet evidence that the accused was intoxicated when it is alleged he committed the crime is admissible as a circumstance tending to show that the act of the accused was not premeditated, and for the purpose of ascertaining and determining the status and condition of his mind at that time.

CRIMINAL LAW—DRUNKENNESS AS DEFENSE.—If an accused was so drunk at the time he is alleged to have committed the crime charged as to render him unconscious of his act, incapable of controlling his will, and forming and entertaining a felonious intent, his intoxication is a defense.

CRIMINAL LAW—EVIDENCE—GOOD CHARACTER.—Previous good character of the accused in a criminal case is a fact which he is entitled to have submitted for the consideration of the jury, precisely as any other circumstance favorable to him, without any disparagement by the court.

J. H. Brown and Brome & Burnett, for the appellant.

C. J. Smythe, attorney general, and E. P. Smith, assistant attorney general, for the state.

610 RAGAN, C. The prosecuting attorney of Stanton county filed an information in the district court thereof in which he charged Edwin Melick, James Latimer, and Robert Forsythe with having forcibly and violently assaulted one Louis Mick, and with forcibly and feloniously, and against his will, taking from him the sum of thirty-eight dollars in money, with the intent to feloniously steal the same. It seems that Melick and Forsythe pleaded guilty to this information and were sentenced to the penitentiary for six years, although this fact is not disclosed by the record. Latimer pleaded not guilty to the information, was tried by a jury, found guilty, and sentenced to a term of seven and one-half years in the state penitentiary. To review this judgment Latimer has filed in this court a petition in error.

611 1. To the information Latimer filed a plea in abatement, alleging that he had not been accorded a preliminary examination of the crime with which he stood charged in the information. To this plea the state filed a replication, and the issues made by such plea and replication were tried to a jury, which returned a verdict in favor of the state, upon which the district court entered a judgment that the information be not abated. It is not claimed by the prisoner that a complaint was not filed against him before an examining magistrate charging him with the identical offense with which he was charged in the information; but the issue of fact raised by the plea in abatement and the state's replication thereto was whether the prisoner had, in fact, been accorded a preliminary examination. The evidence shows without contradiction that a complaint was filed before the county judge of said county charging Forsythe, Melick, and Latimer with having committed the crime of robbery, and that the three parties were arrested on a proper warrant and brought before the county judge. A transcript of the proceedings had before that officer was put in evidence, and disclosed that the three parties were asked by the county judge whether they were guilty or not guilty of the crime charged in the complaint, and that they then and there entered a plea of guilty. Whereupon the magistrate adjudged that they enter into a recognizance for their appearance before the district court in said county at the first day of its next term to answer such charge.

The evidence on behalf of Latimer tended to show that though he was arrested and brought before the county judge with Forsythe and Melick, he was not asked whether he was guilty or not guilty of the crime charged in the complaint, and

that he did not plead thereto. The evidence is undisputed that no witnesses were sworn or examined before the county judge. In other words, that officer did not make any judicial inquiry as to whether the crime of robbery had been committed and whether ⁶¹² there was probable cause for believing the accused committed it. We are of opinion that the evidence in the record establishes, beyond all question, that Latimer, when brought before the county judge, informed that officer that he was guilty of the crime with which he stood charged in the complaint.

The first question, then, is whether Latimer, by pleading guilty before the county judge, waived a preliminary examination. The district court charged the jury trying the issues made by the plea in abatement and the replication thereto that if Latimer, when brought before the county judge, pleaded guilty to the crime charged against him in the complaint, such plea amounted to a waiver by Latimer of his right to a preliminary examination, and it was upon this instruction that the jury found that Latimer had had a preliminary examination. We think the instruction of the district court was correct. Section 585 of the Criminal Code provides: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination." Because of this provision of the Criminal Code the district courts are without jurisdiction to try, on information, one accused of crime, except he be a fugitive from justice, unless he has been first accorded the privilege of a preliminary examination: *White v. State*, 28 Neb. 341; *Coffield v. State*, 44 Neb. 417.

But the preliminary examination provided for by said section 585 of the Criminal Code is in no sense a trial of a person accused of crime. It is not even necessary that the person charged with having committed a crime, on being brought before a magistrate, should be asked to plead or enter a plea of guilty or not guilty to the complaint. The object of the preliminary examination is to ascertain whether the crime charged has been committed, and, if so, whether there is probable cause to believe ⁶¹³ that the accused committed it: *In re Garst*, 10 Neb. 78; *State v. Robertson*, 55 Neb. 41. The statute awarding one accused of crime the right to a preliminary examination was enacted for the benefit of the accused. The preliminary

examination is a right accorded—a personal privilege granted by law to everyone accused of crime—but it is a privilege which the accused may waive: *Coffield v. State*, 44 Neb. 417.

In the case at bar Latimer was accorded the privilege—the right—of a preliminary examination. He did not demand the taking of evidence, and the judgment of the county judge as to its effect; but upon inquiry as to whether he was guilty of the crime with which he was charged in the complaint he voluntarily stated to the magistrate that he was guilty; and by so doing he waived the swearing and examination of witnesses, waived the right given him by statute to have the county judge make judicial inquiry as to whether the crime of robbery had been committed, and as to whether the accused probably committed it.

2. But it is insisted that the district court erred in entering a judgment that the information be not abated, as the court was without jurisdiction to try the accused on that information, because the record of the examining magistrate certified to the district court does not recite that he found that the crime of robbery had been committed and that there was probable cause for believing that the accused committed such crime; in other words, that in order to invest the district court with jurisdiction to try the accused of a crime on information, the proceedings of the examining magistrate certified to the district court must contain a statement that that officer found that the crime charged in the information had been committed and that there was probable cause for believing that the accused committed it, and that the magistrate reached such conclusions after the examination of witnesses. We cannot subscribe to this contention. In support of it counsel for Latimer have ⁶¹⁴ cited us to *People v. Smith*, 25 Mich. 497; *People v. Chapman*, 62 Mich. 280, 4 Am. St. Rep. 857, and *People v. Evans*, 72 Mich. 367. None of these cases is in point here. A statute of Michigan required the evidence taken on a preliminary examination to be reduced to writing and signed by the witnesses, and the examining magistrate to transmit this evidence to the district court with the proceedings had by him on the preliminary examination. In the *Smith* case cited by counsel, the information was quashed; but in that case the accused had not waived a preliminary examination. One had been in fact held, and the court quashed the information, not because the record of the examining magistrate did not contain a finding that a crime had been committed and there was probable cause for believing the ac-

cused committed it, but because the depositions or evidence reduced to writing on the preliminary examination were not signed by the witnesses as required by the Michigan statute. In the Chapman case, the information was quashed because it was filed before the filing in the district court of the depositions of the witnesses who testified before the examining magistrate. In the Evans case, a preliminary examination was held and the proceedings certified to the circuit court by the examining magistrate. An information was then filed against Evans, to which he pleaded in abatement that the justice before whom the examination was held had not stated in his return that any offense, not triable before a justice of the peace, had been committed; nor had such justice, by said return, stated that there was probable cause to believe the respondent guilty of the crime charged, nor of any offense or crime; but that, on the contrary, said justice expressly declared that he did not believe that said offense had been committed or that respondent was guilty thereof, and that he only required respondent to recognize to appear for trial in the circuit court in deference to and by reason of the intense public feeling in reference to and against respondent. On the day this plea ⁶¹⁵ was filed in the circuit court the examining magistrate filed an amended return of the proceedings had before him, in which it was recited: "It appeared to me that an offense not cognizable by a justice of the peace had been committed, and that there is probable cause to believe the prisoner guilty thereof." When this amended return was filed in the circuit court, that tribunal overruled the plea in abatement interposed to the information. Evans was put upon trial and convicted, and the supreme court held that the circuit court erred in overruling the plea in abatement; and that the record of an examining magistrate must show that a crime had been committed and that there was reasonable ground to believe that the accused had committed it, in order to invest the circuit court with jurisdiction to try the accused on information. But the Evans case is not an authority for the contention of counsel here. Evans did not waive a preliminary examination, and the case does not decide—nor any other that I have been able to find—that notwithstanding an accused waives a preliminary examination, still the record of the examining magistrate must disclose that he examined witnesses and made a finding that the crime charged had been committed and that there was probable cause to believe the accused committed it, in order to invest the district court with jurisdiction to try the accused for the crime on

information. If one is charged before a magistrate with the commission of a felony, arrested and brought before this magistrate, and a preliminary examination is held, then it may be that the district court has no jurisdiction to try the accused, on information for the crime with which he is charged, unless the proceedings had before the examining magistrate disclose that he found, after hearing the evidence produced on said examination, that a crime had been committed and that there was probable cause for believing the accused committed it; but, where the accused appears before the magistrate and expressly waives his right to a preliminary examination, or voluntarily ⁶¹⁶ says to the magistrate that he is guilty of the crime with which he is charged, we know of no law which makes it the duty of the magistrate to then proceed to call and examine witnesses and make an inquiry as to whether a crime has been committed, and if so, whether the accused probably was the guilty party. If the accused, on being brought before the examining magistrate, waives his right to a preliminary examination, or pleads guilty of the crime with which he is charged, then the magistrate should recognize him to appear in the district court and enter upon his docket the proceedings that actually occurred; and a duly certified transcript of this record filed in the office of the clerk of the district court will invest that court with jurisdiction to try the accused on information for the crime with which he was accused before the examining magistrate: *Hedges v. State*, 18 Ohio St. 420; *State v. Ritty*, 23 Ohio St. 562.

3. The evidence in this case tends to show that at the time Latimer committed the crime with which he was convicted he was intoxicated; but there is no evidence in the record which tends to show that he formed the intention of committing this robbery and then voluntarily became intoxicated. The court gave to the jury the following instruction twice: "The jury are instructed that voluntary intoxication or drunkenness is no excuse for crime committed under its influence; nor in any state of mind resulting from drunkenness short of actual insanity or loss of reason any excuse for a criminal act." It is the law that when one is charged with a crime he is not entitled to go acquit of the charge simply by showing that at the time he committed the offense he was intoxicated; but we do not understand that, though it appears that when one committed a crime he was intoxicated, the jury are not at liberty to give any weight to this fact, unless it appears that the accused

at the time was actually insane. One might be so drunk as not to be conscious of what he was doing, so drunk as to have no ⁶¹⁷ control of his will, and yet not be actually insane. In the case at bar, the accused was on trial for robbery; and the intent with which he assaulted and took from the prosecuting witness his money was an essential ingredient of the crime for which the prisoner was on trial. The court, in effect, said to them that the evidence before them on the subject of the prisoner's intoxication should count for nothing, unless it established that at the time of the assault the prisoner was actually insane. The instruction given by the district court in this case was given by the district court in *O'Grady v. State*, 36 Neb. 320, and the judgment of the district court was reversed. The feature of the instruction which we are discussing was not commented on by the court in the opinion in that case; but the judgment of the district court was reversed because the court in the instruction also told the jury that if the prisoner's intoxication was voluntary, then evidence of his intoxication could not be considered for the purpose of proving that he did not premeditate or intend to commit the crime with which he was charged. But the court did not approve of the other part of the instruction which, in effect, forbade the jury to give any weight to the evidence of intoxication, unless it established that the prisoner, at the time he committed the offense, was, by reason of such intoxication, actually insane. The doctrine of this court is, that while voluntary intoxication is not of itself a complete defense for one who is charged with the commission of a crime, still the evidence that the accused was intoxicated when it is alleged he committed the crime is admissible as a circumstance tending to show that the act of the accused was not premeditated: *Hill v. State*, 42 Neb. 503; *Head v. State*, 43 Neb. 30; *Debney v. State*, 45 Neb. 856; *Ford v. State*, 46 Neb. 390. In the case at bar, the prisoner was entitled to have the jury consider the evidence which tended to show that he was intoxicated at the time it was alleged he committed the crime, for the purpose of ascertaining and determining the status and condition ⁶¹⁸ of the prisoner's mind at that time. If he was so drunk at that time that he was not conscious of what he was doing, so drunk that he had no control of his will, and was incapable of forming and entertaining a felonious intent, then his act did not render him guilty of robbery, and it was for the jury to determine whether he was at the time so drunk as to be unconscious of his act, incapable of controlling his will, and

forming and entertaining a felonious intent; and though he might have been by reason of his intoxication in such state of mind, it does not follow that he was then actually insane. We think the court erred in refusing to give the instruction asked and in giving the one quoted.

4. As this case is to be tried again, we have thought it our duty to call the attention of the district court to its charge on the subject of the prisoner's good character. The prisoner produced before the jury evidence of good character previous to the time of the alleged commission of the crime for which he was on trial. On this subject the district court gave to the jury three instructions, as follows:

"3. The court instructs the jury that good character is no excuse for crime; that it is only a circumstance bearing indirectly upon the question of the guilt of the accused which you are to consider; and this you will consider in connection with all the other facts and circumstances of this case; and if, notwithstanding you believe from the evidence that the defendant has proved a good character, you still believe beyond a reasonable doubt, from the evidence, that the accused is guilty of the crime charged in the information filed against him, then it is your duty so to find and your verdict should be guilty.

"4. The court instructs the jury that good character raises the presumption that the accused was not likely to have committed the crime with which he is charged; but the force of the presumption depends upon the strength of the opposing evidence to produce conviction ⁶¹⁹ of the truth of the charge. And if the evidence establishing the charge is of such a nature as not, upon principles of reason and good sense, to be overcome by the fact of good character, then the fact that the defendant may have proven himself to have had a good character will be unavailing and immaterial."

"14. The court instructs the jury that evidence of a person's good character is competent evidence in favor of the party accused, as tending to show that he would not be likely to commit the crime charged against him. And in this case, if the jury believes from the evidence that prior to the commission of the alleged crime the defendant had always borne a good character among his acquaintances and in the neighborhood where he lives, then this is a fact proper to be considered by the jury, with all the other evidence in the case, in determining the question whether the witnesses who have testified to the fact tending to criminate him have been mistaken or have testified falsely

or untruthfully; and if, after a careful consideration of all the evidence in the case, including that bearing on his previous good character, the jury entertain a reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him. If, however, the jury believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question as charged in the information, it will be your sworn duty to find the defendant guilty, even though the evidence may satisfy your minds that the defendant, previous to the commission of the crime, has sustained a good reputation and character."

When one is accused of crime, evidence of his previous good character is admissible, in his behalf, upon the theory that, being of good character, it is improbable that he would have committed the crime with which he is charged; and it is for the jury to weigh and consider, and give such effect as they think it entitled, to this evidence, in considering and determining whether the accused is guilty of the crime with which he is charged. But this ⁶²⁰ evidence is not submitted to the consideration of the jury for the purpose of enabling them to determine whether witnesses who have testified for the state have been mistaken or testified falsely, as the court told the jury in instruction No. 14. Another criticism of the instructions is that they savor of argument in favor of the state, and their effect is to caution the jury not to let the evidence of the accused's good character have too much weight in their deliberations. "Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character": Judge Cooley in *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162. In the case at bar, there was before the jury evidence of the prisoner's good character, and it was the province of the jury to consider this evidence, as all the other evidence in the case, and to give it such weight as they deemed it entitled, and they should have been left free and untrammelled in this respect. In *Johnson v. State*, 34 Neb. 257, it was distinctly ruled: "Previous good character of the accused in a criminal prosecution is a fact which he is entitled to have submitted for the consideration of the jury precisely as any other circumstance favorable to him, without any disparagement by the court." To the same effect see *Vincent v. State*, 37 Neb. 672.

The judgment of the district court is reversed and the cause remanded with instructions to grant the prisoner a new trial.

CRIMINAL LAW—DRUNKENNESS AS A DEFENSE.—Voluntary drunkenness ordinarily constitutes no excuse for a crime committed under its influence, even though the intoxication is so extreme as to make the person unconscious of what he is doing or as to create a temporary insanity. If, however, the habit of drunkenness has created a fixed frenzy or insanity, whether permanent or temporary, as, for instance, delirium tremens, such frenzy or insanity is not deemed voluntary, and he who acts under its influence is to be judged as if his condition had not been brought about by his bad habits: *State v. Kraemer*, 49 La. Ann. 766, 62 Am. St. Rep. 664, and note. Intoxication, to excuse crime, must be of such a degree as to render the offender incapable of entertaining an intent to commit such crime. If it falls short of this it is worthless as a defense: *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415, and note. Temporary insanity produced by the recent use of ardent spirits on the part of an accused at the time he commits a crime is not ground for his acquittal, but may go in mitigation of his punishment: *Howard v. State*, 37 Tex. Crim. Rep. 494, 66 Am. St. Rep. 812, and note. If a person suffering under delirium tremens is so far insane as to be irresponsible, the law does not punish him for any crime he may commit while in that state: *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539. But see *State v. Kraemer*, 49 La. Ann. 766, 62 Am. St. Rep. 664.

MANFULL v. GRAHAM.

[55 NEBRASKA, 645.]

JUDGMENTS AGAINST INFANTS.—If infant defendants in a case have been regularly summoned, the failure to appoint a guardian ad litem is error only, and does not render void the judgment entered.

JUDGMENTS AGAINST INFANTS—VACATING.—Under a statute providing that "it shall not be necessary to reserve in a judgment or order, the right of an infant to show cause against it after his attaining full age, but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such judgment," the infant does not, on his arriving at majority, have an absolute right to have the judgment set aside, but only to show cause against it, and does not extend that right beyond the cases mentioned, and under such statute an infant is not entitled to a day in court after reaching his majority to show cause against a judgment ordering a sale of his lands.

JUDGMENTS AGAINST INFANTS—VACATING.—Under section 602 of the code of Nebraska, an infant, against whom an erroneous judgment has been entered, may have it set aside, provided his disability does not appear in the record nor the error in the proceedings, but, if these facts appear, his remedy is by writ of error.

JUDICIAL SALES—TITLE OF PURCHASER.—The title of a stranger derived through sale under judgment is not subject to defeat by the subsequent vacation of such judgment.

JUDGMENTS AGAINST INFANTS—VACATING.—An original action to vacate an erroneous judgment against an infant cannot be maintained without showing a good defense to the first action and judgment.

L. G. Hurd, for the appellant.

B. O. Hostetler, for the appellee.

646 IRVINE, C. Graham brought suit against Manfull and his wife to foreclose a contract for the sale of land, alleging that Manfull had failed to make the payments of purchase-money as provided. A decree was rendered directing the sale of the land to satisfy the amount found due under the contract. It is conceded that Mrs. Manfull's interest is only such as results from the marital relation. The defense interposed by Manfull was that Graham's contract required him to tender a good title in fee simple, and that he was unable to do so because he claimed under a purchaser at a sale foreclosing a mortgage, and the foreclosure was ineffective. The defect in the foreclosure proceedings was that an undivided half interest was in certain minors and that no guardian ad litem had been appointed to represent them.

While the answer alleges a failure to serve process on the infants, the stipulation of facts on which the case was tried discloses no such defect. Where infants are **647** regularly summoned, the failure to appoint a guardian ad litem is an error only and does not render void the judgment entered. Such has been the rule with regard to insane defendants: *McAlister v. Lancaster County Bank*, 15 Neb. 295; *McCormick v. Paddock*, 20 Neb. 486. In the former case, it was intimated that there might be a distinction as to infants, but it was afterward held that there is no such distinction, and that the rule as to infants is the same: *Parker v. Starr*, 21 Neb. 680. *Parker v. Starr*, 21 Neb. 680, establishes a rule of property, and moreover is in accord with the best considered cases. It will not now be departed from.

From the foregoing it follows that the sale made under the foreclosure decree was not void, and that it passed title to the purchaser. But it is said that the infant defendants have not yet reached their majority and may still be heard to question the regularity of the proceedings; that therefore the defendant is not required to accept a title that may be so attacked. The briefs do not indicate very clearly what procedure is still deemed open to the infants. We can conceive of no possible remedy which may remain open unless it be by virtue of section 442

or section 602 of the Code of Civil Procedure, by proceedings in error, or by original action in the nature of a bill in equity.

Section 442 provides: "It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment." For several reasons no right could be claimed by these infants under that section. In the first place, the right there protected is not an absolute right to have the judgment set aside, but it is only to show cause against it. It is not here disclosed by pleadings or by proof that any such cause exists. The failure to appoint a guardian ad litem is not ⁶⁴⁸ such cause. The section quoted recognizes the old chancery rule, based not on formal defects in the proceedings, but on the theory that the infant was not bound by the answer of the guardian ad litem, and might show cause against a decree as well where he had been represented by guardian as where he had not, and this by showing either substantial error, or a defense which had not been interposed. The relief accorded was entirely independent of representation by guardian, and the fact that no guardian had been appointed would be immaterial under this section. Again, it was not in all cases that the infant was so accorded his day in court after reaching his majority. The statute does not extend his former rights in that respect, but merely makes it unnecessary to expressly reserved the right in the decree, and allows the right to be asserted only in such cases as, according to the old practice, such express reservation would be proper. Where the decree directed the sale of the infant's lands, it was under the former practice binding on the infant, and he had no day in court to show cause against it: *Booth v. Rich*, 1 Vern. 295; *Mills v. Dennis*, 3 Johns. Ch. 367. In this respect there was a distinction between a decree ordering a sale and a strict foreclosure.

That portion of section 602 which might be applicable is as follows: "A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made. . . . 5. For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record nor the error in the proceedings." It will be observed that it is only where the condition of the defendant does not appear of record nor the error in the proceedings that this sec-

tion applies. The object of the exception is not at first manifest. The supreme court of Ohio, construing a similar provision, said the reason seemed to be that if the defendant's condition appeared of record it would attract the attention of the court and so insure due scrutiny: ⁶⁴⁹ *Carey v. Kemper*, 45 Ohio St. 93. We think, however, that a better reason is, that proceedings in error may be brought within one year after such a disability is removed, and, if the condition of the defendant and the error are disclosed by the record, such proceedings afford a remedy. Otherwise section 602 becomes available. This seems to be the construction implied in *Jennings v. Simpson*, 12 Neb. 558, from the citation therein of *Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604. In the present case, whether the condition of the infants appeared of record is not disclosed, but that fact is not material. If it was disclosed, and the foreclosure decree should ultimately be reversed on error, the purchaser would be protected by the express terms of section 508 of the Code of Civil Procedure: *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358; *Green v. Hall*, 43 Neb. 275, 47 Am. St. Rep. 761. If, on the other hand, their condition did not appear of record, we still think that section 508 applies, and that the title of the purchaser would not be defeated or affected by a subsequent vacation of the judgment. Vacating judgments under section 602 is referred to under the title of "reversals" by the court rendering the judgment, and we do not think that section 508, in using the word "reversal," contemplated only a reversal by an appellate court. It meant a reversal by any court authorized to set aside the judgment. Its policy was to protect purchasers at sales under judgments which had been rendered by courts of competent jurisdiction in the premises, no matter how erroneous might be the proceedings leading to the judgment. Independent of any statute, a title so derived is not defeated by a subsequent vacation of the judgment: *Allman v. Taylor*, 101 Ill. 185; *England v. Garner*, 90 N. C. 197.

A sufficient reason why the title is not hazarded by an original action is that the defendant suggests no equity in favor of the minors or no defense to the foreclosure. This would be necessary to maintain an original case, and it would indeed be necessary to a proceeding under section 602.

⁶⁵⁰ As it was not shown that the plaintiff's title was defective or even threatened, the judgment of the district court was right.

Affirmed.

JUDGMENTS AGAINST INFANTS.—An infant is bound by a decree against him as much as a person of full age, and can impeach it only upon grounds which would invalidate it if against an adult: *Harrison v. Wallton*, 95 Va. 721, 64 Am. St. Rep. 830; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172, and monographic note.

JUDGMENTS AGAINST INFANTS WHERE NO GUARDIAN AD LITEM.—A judgment against an infant duly served with summons, but without the appointment of a guardian ad litem, though irregular and erroneous, is not void, and is not open to impeachment on collateral attack: *Levystein v. O'Brien*, 106 Ala. 352, 54 Am. St. Rep. 56, and note; *Childs v. Lanterman*, 103 Cal. 387, 42 Am. St. Rep. 121; note to *Parker v. Parker*, 42 Am. St. Rep. 55; *Brandon v. Carter*, 119 Mo. 572, 41 Am. St. Rep. 673; *Eisenmenger v. Murphy*, 42 Minn. 84, 18 Am. St. Rep. 493.

JUDICIAL SALES—TITLE OF PURCHASER.—If a judgment and execution are void, no title passes to the purchaser thereunder, and the defendant therein may replevin the property from such purchaser: *St. Louis etc. Ry. Co. v. Lowder*, 138 Mo. 533, 60 Am. St. 565. Courts go very far in favoring and maintaining titles of purchasers under judicial sales. Thus purchasers under subsisting judgments and decrees acquire a good title, although such judgments and decrees may afterward be reversed; and fraud on the part of others will not affect or taint the title of an innocent purchaser at a judicial sale: *Wilson v. Miller*, 30 Md. 82, 96 Am. Dec. 568; *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455; *Seguin v. Maverick*, 24 Tex. 526, 76 Am. Dec. 117, and note; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172. But though real estate sold under a judgment has passed to third parties, this will not defeat the right of the plaintiff to avoid such sales by showing want of jurisdiction in the court entering such judgment: *Great West Min. Co. v. Mining Co.*, 12 Colo. 46, 13 Am. St. Rep. 204.

JUDGMENTS AGAINST INFANTS—"GIVING DAY."—The insertion of a clause "giving day," et cetera, in a decree for conveyance by an infant of his estate was so strictly insisted upon in all cases under the English equity practice that the omission of it was considered as error in the decree. Such omission, however, did not make the decree void: *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172. See *Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162.

WELTON v. ATKINSON.

[55 NEBRASKA, 674.]

EVIDENCE—PRESUMPTION AS TO LAW OF ANOTHER STATE.—The law of another state on a subject involved in litigation is presumed to be the same as that of the state in which the litigation is being carried on.

NOTARIES PUBLIC—OFFICIAL SEAL.—A notary public is required to attach his official seal to his official acts, and his certificate, unauthenticated by the impression of such seal, is void.

S. B. Pound, R. Pound, and A. N. Sullivan, for the appellant.

D. K. Barr, G. W. Clark, Beeson & Root, and Mockett & Polk, for the appellee.

674 HARRISON, C. J. In error proceedings in this action it is complained that the trial court refused, on motion of plaintiff, to suppress certain depositions and, over objections, admitted them in evidence. An examination of the transcript inclusive of the correction thereof discloses, by fair reading, that the motion to suppress the depositions was properly presented, both in point of manner and time. The addition to the transcript allowed on motion of defendant was evidently made with a purpose to make it appear that the motion for suppression of the depositions was not interposed until after the trial had commenced, but we think a perusal of all the record which refers to this subject leads to the conclusion we have heretofore announced. The certificate attached to the depositions **675** was signed, "D. Shafer, Notary Public," but there was no impression of his official seal. At the close of the testimony of each witness the name of each witness was written, and just below there was a jurat which was signed officially by the notary public, and in each of such places there was the impression of the official seal of the notary; but these jurats were not necessary, and possessed no significance relative to the authentication of the depositions.

In the absence of proof to the contrary, it must be presumed that the law of Arkansas—the state in which the depositions were taken—in regard to notaries public is the same as this state; and in this state it is provided, among other things, that each notary public shall provide himself with an official seal, . . . with which seal, by impression, all his official acts shall be authenticated: See Comp. Stats. 1897, c. 61, sec. 5. And in section 384 of the Code of Civil Procedure it is provided: "Depositions taken pursuant to this article, by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this state or elsewhere, shall be admitted in evidence on the certificate and signature of such officer under the seal of the court of which he is an officer, or his official seal, and no other or further act of authentication shall be required." If an officer is required to attach his official seal to his acts, a certificate unauthenticated by the impression of such seal is invalid: *Byrd v. Cochran*, 39 Neb. 118; *Neese v. Farmers Ins. Co.*, 55 Iowa, 604; *Hewitt v. Morgan*, 88 Iowa, 468; *De Graw v. King*, 28 Minn. 118. The depositions were not sufficiently authenticated and should not have been admitted: *Neese v. Farmers Ins. Co.*, 55 Iowa, 604.

There were other assignments of error, but they were of mat-

ters which we do not deem it necessary to discuss at present. For the error hereinbefore indicated the judgment must be reversed and a new trial awarded, during ⁶⁷⁶ which, if it occurs, these further matters, if erroneous, will doubtless be corrected, or not be again parts of the trial. The judgment is reversed and the cause remanded.

EVIDENCE—PRESUMPTION AS TO LAW OF ANOTHER STATE.—In the absence of an allegation to the contrary, a court will assume that the law of another state is the same as the law of this state: *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, and note; *Goodwin v. Provident Savings etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411; *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45. It is presumed that the common law prevails in a sister state: *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 45 Am. St. Rep. 528; *Myers v. Chicago etc. Ry. Co.*, 69 Minn. 476, 65 Am. St. Rep. 579. But this applies only to states having a common origin or populated by citizens coming from states having a common origin: *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45.

NOTARIES PUBLIC—OFFICIAL SEAL.—All official acts of a notary public should be authenticated by his signature and official seal. An affidavit is not proved to have been made unless the jurat has been authenticated by both such seal and signature: *Tunis v. Withrow*, 10 Iowa, 305, 77 Am. Dec. 117. But see *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 49. An unsigned certificate of acknowledgment by a notary public is void, though it is attested by his seal: *Clark v. Wilson*, 127 Ill. 449, 11 Am. St. Rep. 143. But see *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355, and note.

IN RE FANTON.

[55 NEBRASKA, 703.]

HABEAS CORPUS—REVIEW OF ERRORS.—Habeas corpus is not an appropriate proceeding to review mere errors and irregularities in a judgment of an inferior court in a criminal case.

HABEAS CORPUS—VOID JUDGMENT.—If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus, but the judgment must be void and not merely erroneous.

HABEAS CORPUS.—AN EXCESSIVE SENTENCE imposed by a court having jurisdiction is merely erroneous and not void, and habeas corpus does not lie on behalf of the convicted prisoner to obtain relief therefrom. His remedy is by writ of error.

R. R. Dickson and G. A. Day, for the petitioner.

C. J. Smyth, attorney general, and E. P. Smith, deputy attorney general, for the state.

⁷⁰⁴ **NORVAL, J.** An information was filed in the district court of Holt county, charging "that one John Fanton, late of

the county aforesaid, on the twentieth day of December, 1895, in the county of Holt and state of Nebraska aforesaid, the said John Fanton then and there being, did unlawfully and feloniously steal, take, and drive away eighteen (18) head of mixed cattle, described as follows: All of said cattle being of the value of three hundred dollars, and the personal property of one Timothy Cross; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." A trial was had thereunder, the accused was found guilty as charged in the information, the value of the property stolen was fixed by the jury at three hundred dollars, and a sentence of eight years' imprisonment in the penitentiary was imposed by the court. Error proceeding was prosecuted to this court, which resulted in the affirmance of the judgment and sentence below: *Fanton v. State*, 50 Neb. 351. Afterward this application was made for his discharge from imprisonment upon a writ of habeas corpus.

705 It is insisted that the petitioner was prosecuted under chapter 77 of the Session Laws of 1895 (Crim. Code, sec. 117a), and that his conviction is illegal and void, because said chapter failed to pass both branches of the state legislature. The chapter assailed purports to make cattle-stealing a distinctive crime; and whether such legislation was adopted in the constitutional mode it is unnecessary to now determine, since it will be observed that the information under which the conviction was obtained alleged every ingredient of the crime of grand larceny, as defined by section 114 of the Criminal Code. The district court having jurisdiction of the crime charged, as well as over the person of the petitioner, its judgment and sentence are not void: *In re Ream*, 54 Neb. 667.

The maximum sentence authorized to be imposed by section 114 of the Criminal Code upon a conviction of grand larceny is seven years' imprisonment, while the petitioner was adjudged to be confined in the penitentiary for the term of eight years. It is argued that the sentence of the court, being in excess of the maximum limit authorized by law, is void. The soundness of this contention depends upon the fact whether or not the defect indicated constituted an error or irregularity merely, since it is firmly established in this state that habeas corpus is not the appropriate proceeding to review mere errors and irregularities in a judgment of an inferior court in a criminal case. The writ of habeas corpus cannot operate as a proceeding in error: *Ex parte Fisher*, 6 Neb. 309; *In re Balcom*, 12 Neb. 316;

Buchanan v. Mallalieu, 25 Neb. 201; In re Betts, 36 Neb. 282; State v. Crinklaw, 40 Neb. 759; In re McVey, 50 Neb. 481; In re Ream, 54 Neb. 667. If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity: In re Havlik, 45 Neb. 747.

Mr. Church, in his valuable treatise on Habeas Corpus, ⁷⁰⁰ states: "The general rule is, that when a court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities. It is only when the court pronounces a judgment in a criminal case which is not authorized by law, under any circumstances, in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void so as to justify the discharge of the defendant held in custody by such judgment. Thus a judgment of conviction is not void because of the failure to inform the accused of his right to an appeal or because of the fact that there were gross irregularities committed during the trial, in the impaneling of the jury, in the introduction of evidence, and in the rendition of the verdict, or because an excessive punishment has been imposed—except as to the excess": Church on Habeas Corpus, sec. 370. And at section 373 the same author uses this language: "The prevailing rule is, that an excessive sentence is merely erroneous and voidable; that the whole sentence is not illegal and void because of the excess; that it is not void ab initio; and that it is good on habeas corpus so far as the power of the court extends, and invalid only as to the excess." Numerous decisions are cited by the author which fully sustain the doctrine announced in the foregoing excerpts. The following are in point: People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; People v. Jacobs, 66 N. Y. 8; People v. Baker, 89 N. Y. 460; Ex parte Henshaw, 73 Cal. 486; In re Graham, 138 U. S. 461; In re Crandall, 34 Wis. 177; In re Graham, 74 Wis. 450, 17 Am. St. Rep. 174, 76 Wis. 366; In re Pikulik, 81 Wis. 158; Ex parte Mooney, 26 W. Va. 36, 53 Am. Rep. 59; Feeley's case, 12 Cush. 598; Ex parte Crenshaw, 80 Mo. 447; People v. Markham, 7 Cal. 208; Ex parte Shaw, 7 Ohio St. 81, 70 Am. Dec. 55; Ex parte Van Hagan, 25 Ohio St. 427. A judgment imposing sentence to imprisonment for a longer period than authorized by statute is not void for want of jurisdiction, but erroneous merely. It is the excessive portion of the sentence alone that is invalid, and

relief cannot be had therefrom ⁷⁰⁷ upon habeas corpus until the valid portion has been served.

In *In re Graham*, and in *In re McDonald*, 74 Wis. 451, 17 Am. St. Rep. 174, the petitioners were convicted of a felonious assault and robbery, and sentenced to the penitentiary for the term of thirteen years each, while the maximum punishment allowed by statute for that crime was ten years. They applied for a writ of habeas corpus on the ground of excessive sentences. The writ was denied, the court, through Cole, C. J., saying: "We deny the writs, for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of habeas corpus. The judgments are doubtless erroneous, and would be reversed on a writ of error (*Fitzgerald v. State*, 4 Wis. (*395) 412; *Haney v. State*, 5 Wis. 529; *Benedict v. State*, 12 Wis. 314; *Peglow v. State*, 12 Wis. (*534) 595); but the judgments are not void: *State v. Sloan*, 65 Wis. 647. The court had jurisdiction of the persons and subject matter or offense, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by habeas corpus. The law is well settled in this court that on habeas corpus only jurisdictional defects are inquired into. The writ does not raise questions of errors in law, or irregularity in the proceedings."

Ex parte Van Hagan, 25 Ohio St. 426, was an application for discharge on habeas corpus, where an excessive sentence was imposed. The court say: "The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void. It follows that a writ of error to reverse the proceedings or sentence is the remedy that the relator should have resorted to in order to obtain a discharge from illegal imprisonment, and not habeas corpus, which is not the proper mode of redress where the relator was convicted of a criminal offense, and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction: *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55, approved and followed on this point."

⁷⁰⁸ The defect in the sentence imposed on John Fanton was not jurisdictional, but merely erroneous, since the district court acquired jurisdiction over his person and of the subject matter, and the judgment rendered was of the kind authorized by the statute. *In re McVey*, 50 Neb. 481, is not in conflict with the conclusion reached herein, although there is to be found in the

report of that case language apparently opposed to the doctrine announced in the case at bar. In the McVey case it was asserted that the court must possess jurisdiction to impose the particular sentence adjudged, else the same will be void. When that thought was expressed, the court did not have in mind, or under consideration, a sentence inflicted in excess of the limit authorized by the legislature. There the petitioner has been found guilty of the statutory offense of breaking and entering a building in the daytime, while the information under which he was tried did not charge him with having committed that crime, but did charge a burglary committed in the night season. He was prosecuted for one offense, and convicted for another, so that the court did not have jurisdiction of the subject matter, or of the power to impose that particular sentence at that time in that case, and the sentence was void. If, upon a conviction for burglary, the court should sentence the accused to be hanged, the judgment would be void for want of jurisdiction of the court to impose a sentence of that kind in that case. But it would be otherwise if the court should adjudge an imprisonment in the penitentiary for a longer period than fixed by statute for the crime of burglary. In the latter case, the sentence would be erroneous merely, but not void. In the one case the court had no jurisdiction to impose that particular kind of a sentence upon conviction of burglary, while in the other the statutory kind of punishment was meted out, although the time of imprisonment exceeded the statutory bounds. A sentence of a different character than that authorized by law to be imposed for the crime of which the accused has been found guilty is void, while ⁷⁰⁹ a sentence which imposes the statutory kind of punishment is not absolutely void, although excessive. In the former case, the entire punishment is invalid, while as to the latter the excessive portion is alone erroneous, and not void in such a sense as to be available on habeas corpus, at least until after the valid portion of the judgment has been executed. The writ is denied.

HABEAS CORPUS—REVIEW OF ERRORS.—If a court has jurisdiction over the subject matter, although its judgment may be erroneous, it is not void and cannot be reviewed on habeas corpus: *Ex parte Tinsley*, 37 Tex. Crim. Rep. 517, 66 Am. St. Rep. 818. Habeas corpus cannot be used as a writ of error to review proceedings under which a party is imprisoned for contempt of court: *In re Copenhaver*, 118 Mo. 377, 40 Am. St. Rep. 382, and note; *Smith v. Clausmeier*, 136 Ind. 105, 43 Am. St. Rep. 311; *Ex parte Mitchell*, 104 Mo. 121, 24 Am. St. Rep. 324.

HABEAS CORPUS—VOID PROCEEDINGS.—A writ of habeas corpus cannot reach errors or irregularities which render proceedings voidable merely, but only such defects in substance as renders the process or judgment absolutely void: *Barton v. Saunders*, 10 Or. 51, 8 Am. St. Rep. 261; *Ex parte Keeler*, 45 S. C. 537, 55 Am. St. Rep. 785; *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305.

HABEAS CORPUS—EXCESSIVE SENTENCE.—One imprisoned for violating an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by writ of habeas corpus: *Ex parte Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557. A judgment sentencing a prisoner for a longer time than the statute warrants is erroneous, but not void, and he is not entitled to be discharged on habeas corpus: *In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, and note.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

STEINBACK v. DIEPENBROCK.

[158 NEW YORK, 24.]

INSURANCE, LIFE—POLICY OF, MAY BE ASSIGNED TO ONE HAVING NO INSURABLE INTEREST.—A valid policy of life insurance is assignable. Hence, if a policy is, in good faith and not for the purpose of assignment, taken out, either by the insured himself, or by another, who has an insurable interest in his life, it may be lawfully assigned to one who has no insurable interest in the life of the insured, and the assignee may, therefore, enforce collection of the full amount of the policy from the company, where the assignment is general and absolute.

INSURANCE, LIFE—CONTRACT OF, AND ITS ASSIGNMENT—CONSTRUCTION—INTENTION — WAGERING POLICY. The intention of the parties procuring a life insurance determines its character. Hence, if one should take out such a policy to himself, and at once assign it to a person having no insurable interest in his life, the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction, for the purpose of frustrating a wagering policy.

INSURANCE, LIFE—POLICY OF—RIGHT TO ASSIGN—FAILURE OF HEALTH.—A person whose life is insured is not deprived of the right to realize on his policy, by its assignment, whenever his necessities press him, because of a failing condition of health.

Action brought to recover the proceeds of a certain policy of insurance for ten thousand dollars, issued on the life of Alois Diepenbrock, appellant's testator. The amount due thereon was claimed, on the one hand, by the plaintiff, Erwin Steinback, as assignee, and on the other hand by the defendant Louise Diepenbrock, as executrix of the estate of Alois Diepenbrock, deceased. Suit was brought against the insurance company to recover the amount due upon the policy, and the company admitted its liability to some one. The policy had been originally

assigned to William Erdtmann, who had assigned it to the plaintiff. The company, therefore, paid the money into court and had the defendant Louise Diepenbrock, as executrix, and William Erdtmann substituted as defendants. A judgment in favor of the plaintiff and the defendant Erdtmann was affirmed, and the defendant Louise Diepenbrock appealed.

A. Edward Woodruff, William Phlippeau, and Max Meyer, for the appellant.

James Cowder Meyers, Louis C. Raegener, and Thomas M. Rowlette, for the respondents.

26 PARKER, C. J. The counsel for the appellant in his argument insisted with great earnestness and force that the position several times asserted by this court in support of the legality of the assignment of a policy of insurance to a person having no insurable interest in the life of the insured is a mistaken one and in conflict with the decisions of the United States supreme court and the court of last resort in many of the states.

Warnock v. Davis, 104 U. S. 775; Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Missouri Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; Schonfield v. Turner, 75 Tex. 324; Basye v. Adams, 81 Ky. 368, and Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316, furnish support for his assertion as to the rule in the United States supreme court and in some of the other states. Supported by these authorities, the counsel challenged the correctness of the rule that concededly has been long acquiesced in in this state by the courts and the profession. Indeed, Mr. Justice Field in his opinion in Warnock v. Davis, 104 U. S. 775, stated the rule in this state to be that a valid assignment of a policy of **27** insurance could be made to a person without interest in the insured. But the appellant contends that, while this may be the rule here, the decisions in other jurisdictions demonstrate that our position is wrong as a matter of sound public policy, and therefore the true rule should be laid down, notwithstanding that expressions inducing the belief that the above rule obtained may have been made by our courts. It is urged that this task will not be a difficult one, for the reason, as the appellant contends, that there have been no cases in this state where the question was necessarily up for decision, and therefore all that has been said upon that subject by this court is mere dictum.

In *St. John v. American Mut. Life Ins. Co.*, 13 N. Y. 31, 64 Am. Dec. 529, a recovery in favor of the plaintiff against an insurance company was sustained where it appeared that one Noyes had effected policies of insurance upon his own life and shortly afterward assigned them to the plaintiff for a valuable consideration. In the answer the defendant alleged, by way of defense, that the plaintiff was entitled to recover only the amount of money that he had advanced as a consideration of the transfer of the policy to him, and that if defendant was liable beyond such amount upon the policy, the personal representatives were interested in the excess, and therefore necessary parties to the suit. And upon the close of the evidence the counsel for the defendant pressed the point that the plaintiff had no insurable interest in the life of the insured, and therefore was not entitled to judgment. The court regarded the question as one necessary to be passed upon in the final disposition of the case, and, after considering it, held that the policies in question were valid in their inception and that the assignment of them to the plaintiff did not affect the liability of the company, and that to entitle the assignee to a recovery it was not necessary for him to have had an insurable interest in the life of the insured.

The next case was *Valton v. National etc. Assur. Co.*, 20 N. Y. 32, where Schumacher obtained a policy on his life for ten thousand dollars, and by his articles of copartnership agreed that the plaintiff and another partner should become the owners of the ²⁸ policy and all due thereon in the event of his death before the termination of the partnership. This contingency happened, and the court held that it operated to vest absolutely the title to the policy in the plaintiff and his other partner, and a recovery could be had thereon as against the defendants.

It will be observed that in the cases cited the contest was between the assignee and the company issuing the policy, and the question was not squarely presented whether, as between the assignor and the assignee, the assignee would be entitled to retain more than the sum actually invested by him, which is the rule in some jurisdictions. But it necessarily was decided that the policy was not rendered invalid by the assignment, and further that the assignee acquired thereby the right to enforce collection of the full amount of the policy from the company.

In *Olmsted v. Keyes*, 85 N. Y. 593, the plaintiff, having obtained the proceeds of a policy of life insurance, brought an

action for the purpose of ascertaining and determining the conflicting claims of various defendants to the moneys paid on the policy. It appeared that Keyes procured a policy of insurance on his life, payable to the plaintiff as trustee for his wife Huldah; Huldah died intestate a few years later; afterward Keyes married again, and thereupon the plaintiff for value assigned the policy to Keyes' second wife at his request. Keyes subsequently died intestate, leaving him surviving his widow and one child by her and several children by his first wife. It was held that during the life of the first wife the policy was her property; upon her death the title vested in her husband as survivor, and he having caused it to be assigned to his second wife, the assignment vested the title in her, and she alone was entitled to the money due thereon. There was a difference of view in the court as to the disposition of the case, and the argument that led to the decision considered with care the assignability of a policy of life insurance like any other contract; in the course of the argument the court referred to and considered many authorities in England and in this country, and ²⁹ reached the conclusion that while an insurable interest is necessary to enable one to take out a policy of insurance on the life of another, it is not necessary that the assignee of a policy validly issued should have such an interest. After careful examination of that opinion we find it impossible to reach any other conclusion than that it was intended to put at rest whatever controversy there may have been in this state touching the assignability of a valid policy of insurance. The case at bar is the only one we know of where the rule laid down in the case last referred to has been seriously questioned, although it is true that some discussion of the principle was had in *Wright v. Mutual etc. Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749, where the defendant unsuccessfully challenged the right of the assignee to recover on the ground, among others, that the plaintiff had not an insurable interest in the life of the insured at the time of the assignment; the court in its opinion cited the case of *Olmsted v. Keyes*, 85 N. Y. 593.

The result of our further examination persuades us that what has been understood to be the rule in this state is not only in line with the authorities in most jurisdictions upon that subject, but is sound as a matter of public policy. It was formerly the rule in England that while a policy of insurance could not be assigned at law it could in equity. By the act of 1867 (30 & 31 Vict., c. 144) a policy of life insurance was made assigna-

ble at law, and in some of the decisions it was said by the court that the object of the statute was to enable the assignee to sue in his own name; but it did not in any other way improve the position of the assignee, who could before that secure the money in equity: *B. E. Ins. Co. v. G. W. R. Co.*, 38 L. J. Ch. 132; *In re Turcan*, L. R. 40 Ch. Div. 5.

The rule asserted by this court has also been held to be the law in many of our sister states in a number of cases where the question has been raised either in actions brought by personal representatives of the assignor to recover the money received by the assignee on a policy, or in suits brought by the company issuing the policy for the purpose of determining whether the personal representatives or the assignee were ³⁰ entitled to the proceeds, all claimants being made parties defendant: *Mutual etc. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Eckel v. Renner*, 41 Ohio St. 232; *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620; *Fitzpatrick v. Hartford etc. Ins. Co.*, 56 Conn. 116, 7 Am. St. Rep. 288; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Murphy v. Red*, 64 Miss. 614, 60 Am. Rep. 68; *Rittler v. Smith*, 70 Md. 261. These authorities are, it seems to us, well grounded in principle. They recognize not only the existence of, but the necessity for, the rule that forbids any insurance upon the life of a person, in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a wager policy, or a mere speculative contract upon the life of the insured, with a direct interest in favor of its early termination. It is, in terms, forbidden by statute in England (14 Geo. III, c. 48) and in many other jurisdictions, including this state (Laws 1892, c. 690, sec. 55), and this court held in *Ruse v. Mutual Benefit etc. Ins. Co.*, 23 N. Y. 516, that such insurance is void at common law, and that the English statute, in so far as it prohibits such insurance, is merely a declaratory act. But the question we are considering presupposes a valid contract of insurance, the policy being issued either for the benefit of the assured personally, or for the benefit of some one having an insurable interest in the assured at the time of the taking out of the policy. Such a policy constitutes a contract to pay a certain amount of money to the payee on the death of the assured. It is a chose in action with all the ordinary incidents belonging thereto, and as such may be assigned either as collateral or absolutely, as the payee may elect. While an insurable interest in the payee is necessary, in the first instance, to the creation of a valid contract,

it is not necessary that such interest should continue. The case of a wife divorced from her husband will serve as an illustration. The policy taken out for her benefit during the existence of the married relation is not affected by a subsequent severance of that relation through a decree of a court of competent jurisdiction by which she ceases to have an insurable interest in his life: *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457. The ³¹ materiality of the value of the interest has relation to the question whether the policy is taken out in good faith, and not as a gambling transaction. If it be taken out in good faith, then a sound public policy would seem to require that the payee should be permitted to treat it as he may any other chose in action and go to the best market he can find, either to sell it or borrow money on it. It would substantially confine him to such terms as the company issuing the policy should choose to make with him, if he should be limited in his choice of a purchaser to the party having an interest in the continuance of the life of the assured.

On the other hand, it is said that if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned under such circumstances would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction.

Cammack v. Lewis, 15 Wall. 643, and *Warnock v. Davis*, 104 U. S. 775, were cases where the policies were taken out in order that they might be assigned to the assignees, through their procurement, under circumstances that might well be held to be in evasion of the law prohibiting gaming policies.

In *Warnock's* case, the agreement touching the procurement of the policy and the use to be made of it, including the promise to assign it, was in writing, and executed the very day the policy was applied for, and the day following the assured executed an assignment of the policy, which had in the meantime been issued in pursuance of such an agreement. The insurance company paid over the money to the assignee, and the court held

that the personal representatives of the assured ³² were entitled to receive from the assignees all the money except the sums advanced by them under the agreement, plus the sum paid by them to the widow. In the opinion it is said that the assignment of the policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. That remark was clearly true as applied to the facts of that case, for the policy was taken out in pursuance of an agreement to assign it. It was, therefore, in fact a policy taken out for the benefit of parties having no insurable interest, although in form issued to the assured and by him assigned to such parties. In such case, the court will always declare the fact to be as it is, without regard to the effort of the parties to hide the truth and cheat the law. But the language employed by the court, and evidently advisedly, is broad enough to cover all assignments of policies to parties not having an insurable interest, including as well those taken out in good faith and kept up as long as the financial condition of the insured permits, as those deliberately taken out for the purpose of speculation upon a life that the intended beneficiary, whether as payee in the policy or by assignment, has no interest in prolonging. The point of actual separation between the cases asserting the assignability and those asserting the nonassignability of policies of insurance to persons not interested in the continuance of the life of the assured, seems to be that those asserting nonassignability proceed on the assumption that the question is one of law, and that if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily valid and free from the taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth, all the facts and circumstances may be proved, and if it then appear that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contract invalid, not because of the assignment, but in spite of it.

³³ Warnock's case and this one are very wide apart in their facts and serve very well to illustrate the necessity for the position taken by the courts of this state upon this general subject.

In December, 1887, Alois Diepenbrock took out a policy of insurance on his life in the Equitable Life Assurance Society. He paid the premiums regularly down to December, 1892, a period of about five years, at which time the surrender value of

the policy was about four hundred and eighty-five dollars. He was pressed for money, and finally sold the policy to the defendant Erdtmann for six hundred dollars, or something like one hundred and fifteen dollars more than he would have received by the surrender of the policy to the company. He had paid a much larger sum in premiums, something over two thousand dollars, and there seems to be no good reason why a person owning such a policy, and obliged to sell it, should not be permitted to get back as much as possible of the money that he has paid out for insurance. His condition of health may have changed very materially, of which fact the company can take no advantage; for in its contract it made allowance for that possibility. There is no good reason for saying that an insured person should not have the right, whenever his necessities press him because of a failing condition of health that assures a speedy death, to realize on his policy and obtain for it something like a fair price, which may, perhaps, be almost equal to its face value.

The personal representatives of the assured contested the assignment also, on the ground that it was intended as collateral, although in form a valid assignment, but the special term found otherwise, and the appellate division approved that finding, so that question is no longer open for consideration.

Other questions are presented by the appellant, but after a careful examination of them we conclude that no error was committed below that will support a reversal of the judgment.

The judgment should be affirmed, with costs.

* All concur, except Martin, J., absent.

ASSIGNMENT OF LIFE INSURANCE POLICY TO ONE HAVING NO INSURABLE INTEREST.—The assignee of a policy of life insurance need not have an insurable interest in the life of the insured in order to entitle him to recover the amount of the insurance: Note to Cheeves v. Anders, 47 Am. St. Rep. 114, where authorities to the contrary are collected. Compare the extended note to Equitable Life Ins. Co. v. Hazlewood, 16 Am. St. Rep. 907, where the subject is discussed. A man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest, as such a transaction is not a wagering contract: Hill v. United Life Ins. Assn., 154 Pa. St. 29, 35 Am. St. Rep. 807.

JACKSON ARCHITECTURAL IRON WORKS v. HURLBUT.

[158 NEW YORK, 34.]

A COMMON CARRIER IS ONE WHO, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and everyone who undertakes to carry for compensation the goods of all persons indifferently is, as to liability, to be deemed a common carrier.

CARRIERS, COMMON—WHO ARE.—TRUCKMEN, wagoners, cartmen, and porters who undertake to carry goods for hire as a common employment in a city, or from one town to another, are common carriers, although carrying is not the exclusive business of the parties.

CARRIERS, COMMON—TRUCKMEN, WHO MOVE HEAVY MACHINERY.—If persons advertise themselves as general truckmen, their particular specialty being the moving of heavy machinery, and they keep and maintain for this purpose a large number of trucks and horses, and the necessary help for the prosecution of the business, there is, in an action against them for damages caused by injury to such machinery, during its transportation, no error in the refusal of the trial judge to instruct the jury that the defendants are not common carriers. The circumstance that the defendants have no regular tariff of charges for their work, but that a special price is fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed and commensurate with the carrier's responsibility as such.

NEGLIGENCE—TRUCKMEN—MOVING OF HEAVY MACHINERY—COMMON CARRIERS.—It is not material, in an action against truckmen to recover damages for injuries to heavy machinery, which they have been employed to transport, whether the defendants are answerable as common carriers, where the case is tried and submitted to the jury, not upon the theory that the defendants are liable as insurers of the safety of the property, but upon the theory that they were negligent in unloading the machine, and thus caused the injuries. It was not, therefore, prejudicial to the defendants for the trial court to refuse to charge that they were not common carriers.

NEGLIGENCE—TRUCKMEN—MOVING OF HEAVY MACHINERY—LIABILITY.—If truckmen are employed to transport a large and heavy planing machine, used for planing iron, they must use, at least, ordinary diligence and care, and are answerable if they negligently break and seriously injure the machine while unloading it.

DAMAGES — INJURY TO HEAVY MACHINERY THROUGH NEGLIGENCE OF TRUCKMEN—PUTTING IN CONDITION FOR USE.—If truckmen, in moving a large and heavy machine for planing iron, negligently break and injure it, the expense of restoring it to a condition for use is a proper element of damage, in an action for such injury, for it is plain that the machine is not an article that the plaintiff can procure in the market at any time. Hence, if that item of expense alone exceeds the verdict, it is unnecessary to consider or discuss other items admitted in evidence upon the question of damages.

Action to recover damages for the breaking of a planing machine belonging to the plaintiff while in the custody of defendants, Hurlbut and others, for transportation to the plaintiff's factory. The defendants were truckmen of New York city. There was a judgment for the plaintiff, and the defendants appealed.

Charles A. Collin, for the appellants.

Jesse Grant Rowe, for the respondent.

30 O'BRIEN, J. The question in this case involved the responsibility of the defendants for an injury to property while it was in their custody as bailees for hire or reward. They were employed by the plaintiff in February, 1892, to transport a large planing machine, used for planing iron, over thirty feet long and weighing over ten tons, from the foot of Twenty-third street on the North river to the plaintiff's factory at East Twenty-eighth street in the city of New York. The agreed compensation for the service was sixty dollars. They undertook to perform the work, and while unloading the machine at the factory it was broken and seriously damaged, and hence it is alleged that they failed to perform the service which they undertook to perform, since they did not deliver the property according to the duty imposed upon them by law. The plaintiff recovered a verdict of five hundred dollars as damages for the injury to the machine and for the loss of the use of it while it was being repaired, and the judgment entered on the verdict has been affirmed at the general term.

The principal question discussed in the case concerns the duty or obligation which the law imposes upon the defendants when they undertook to perform the service. The learned counsel for the defendants contends that their responsibility was not that of a common carrier, and that they were not subject to the strict liability which is an incident of that relation. In other words, that they were not insurers for the safe delivery of the machine as a common carrier is for the delivery ³⁷ of the goods or property which he undertakes to carry and deliver. At the trial, the court was requested in behalf of the defendants to instruct the jury that they were in this transaction carriers for hire and not common carriers. This request was refused and an exception taken. It will be seen hereafter that it is not very important to determine whether the defendants were common carriers, or merely engaged under a contract with the plaintiff to transport

the machine for a stipulated compensation. The question with respect to the true legal relation in which the defendants stood to the plaintiff, whether a common carrier or something else, is an abstract one. But since the defendants complain of the refusal of the learned trial judge to give to the jury the instruction requested, and insist that this error, if it be one, may have prejudiced the defendants on the whole case, it may be proper to examine it briefly in order to see how much of substance there is in the exception. The defendants advertised themselves as general truckmen, their particular specialty being the moving of heavy machinery. They kept and maintained for this purpose a large number of trucks and horses, and the necessary help for the prosecution of this business. On this state of facts there was no legal error in the refusal of the learned judge to instruct the jury that the defendants were not common carriers.

Truckmen, wagoners, cartmen, and porters who undertake to carry goods for hire as a common employment in a city or from one town to another, are common carriers. It is not necessary that the exclusive business of the parties shall be carrying. Where a person whose principal pursuit is farming solicits goods to be carried to the market town in his wagon on certain occasions, he makes himself a common carrier for those who employ him. The circumstance that the defendants had no regular tariff of charges for their work, but that a special price was fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned ³⁸ to the risk assumed and commensurate with the carrier's responsibility as such. A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and everyone who undertakes to carry for compensation the goods of all persons indifferently is, as to liability, to be deemed a common carrier: *Bank of Orange v. Brown*, 3 Wend. 158; *Schouler on Bailments and Carriers*, 2d ed., 351; *Story on Bailments*, secs. 495, 496; 2 *Kent's Commentaries*, 4th ed., 598, 599; 2 *Parsons on Contracts*, 165, 175; *Angell on Carriers*, 870; *Allen v. Sackrider*, 37 N. Y. 341; *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712. While, therefore, the question as to whether the defendants were subject to the responsibility of common carriers was not very material in this case, yet we think it would be difficult to show that there was any legal error in the charge of the learned trial judge in that respect.

This was not an action against the defendants as common carriers. They were not held liable upon the ground that they were insurers of the safety of the property which they undertook to deliver, but on the ground of negligence. It must be, and is, admitted that they were bound by their contract to exercise at least reasonable care in the transportation and delivery of the machine, and that they are liable for damages caused by their negligence in the discharge of the duty which they undertook to perform. The case was tried upon the theory that the defendants failed to use reasonable care in unloading the machine after it had reached its destination, and through this negligence the damage and injury occurred. In the complaint the defendants are charged with negligence in the performance of this duty, and this allegation was sustained by evidence at the trial. At all events, the evidence was sufficient to require its submission to the jury, and the finding on that question having been in favor of the plaintiff, it is not open to question or review here. All this is, we think, very clear from the charge and requests made in behalf of the defendants. The court was requested by the ³⁹ defendants' counsel to charge that, as carriers for hire, they were not liable for loss or injury which could not have been prevented by the use of ordinary diligence, and that they were not liable for any loss or injury occasioned by unavoidable accident. These propositions were charged as requested, and, hence, it plainly appears that, although the court refused to charge that the defendants were not common carriers, yet he did charge that they were not liable for any loss or injury which could not have been prevented by ordinary diligence. So the measure of liability which the defendants were held to was that of ordinary diligence and care. This was certainly the most favorable view of the case that the defendants had any right to expect; and since the jury has found upon sufficient evidence that they were wanting in the exercise of such care in unloading the machine from the truck at the factory, the merits of the controversy are not open to review in this court.

It is also urged that the plaintiff, through its servants or employés, present at the time of the delivery of the machine, was guilty of negligence contributing to the injury. It seems that the truck with this machine arrived at the factory some time after dark, and it is said that the defendants advised against unloading such a heavy machine at that time, but that the plaintiff's superintendent said that it could not remain out doors all night, and that it should be delivered: This is the

interference on the part of the plaintiff's agents that is said to constitute contributory negligence. It is quite sufficient to say, with respect to that branch of the defense, that the evidence was of such a character that required the court to submit it to the jury, and it was submitted with instructions that, if it was shown that the negligence of the plaintiff or its agents contributed in any way to the injury, there could be no recovery. So the questions of negligence and contributory negligence have been removed by the verdict of the jury from the domain of controversy in this court.

There remains one other question to be considered, and that arises upon an exception taken to the admission in behalf of the plaintiff of certain evidence on the question of damages. ⁴⁰ It is urged that the trial court admitted evidence on that subject to show the loss of profits from inability to use the machine after the injury and until repaired. But no evidence as to loss of profits was given. Some proof was given that the plaintiff was compelled, on account of the injury to the machine, to send work out of the shop in order to complete contracts they had on hand at the time of the breaking of the machine, and that for such work they were compelled to pay a sum amounting to four hundred and thirty-five dollars. This was not proof of the loss of profits, but of the loss occasioned to the plaintiff by inability to use the machine on account of the defendants' negligence. We are not prepared to say that this evidence was not entirely competent under the circumstances of the case: *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Redmond v. American Mfg. Co.*, 121 N. Y. 418. But it is not necessary to consider that question, since it appears that the evidence was immaterial, and could not very well have operated to the injury of the defendants, even if not admissible. The verdict of the jury was for five hundred dollars. The proof was substantially uncontradicted that a new bed was absolutely necessary to repair the machine and render it fit for use, and that the cost of this was eight hundred and fifty-five dollars. It is plain that the machine was not an article that the plaintiff could procure in the market at any time, and hence the expense of restoring it to a condition for use was a proper element in the estimation of the damages, and that item of expense alone exceeds the verdict. The defendants' counsel requested the court to charge the jury that the measure of damage is that compensation which will fit the actual loss sustained and which was the natural and proximate consequence of the defendants' act. Also, that no damages

which might fairly be supposed not to have been the natural and necessary consequence of the defendants' act could be recovered. These propositions were charged by the court as requested. The item of the expense of restoring the machine to a condition that would render it fit for use is certainly within the principle of this request. The cost of procuring necessary work to be done outside the factory in order to enable the plaintiff to fill ⁴¹ its contracts resulting from inability to use the machine, would seem to be within the same principle also. But since proof of the first item is sufficient to sustain the verdict rendered, the right to recover the other item need not be considered or discussed. On the whole case it is apparent that the rulings at the trial and in the charge were quite as favorable to the defendants as the law permits, and the amount of the verdict was, under the circumstances, extremely moderate.

The judgment is right and should be affirmed, with costs.

All concur (Vann, J., in result), except Martin, J., absent.

COMMON CARRIERS are persons who undertake for hire or reward to transport the goods of such as choose to employ them from place to place: Doty v. Strong, 1 Pin. 313, 40 Am. Dec. 773. A waggoner carrying goods for hire is a common carrier, though that is not his principal business, but only an occasional and incidental employment: Phillee v. Sanford, 17 Tex. 227, 67 Am. Dec. 654; Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639; Gordon v. Hutchinson, 1 Watts & S. 285, 37 Am. Dec. 464.

CULLIFORD v. WALSER.

[158 NEW YORK, 65.]

SURETIES—DIFFERENT SETS OF, INCLUDING BAIL—ORDER OF LIABILITY.—As between different sets of sureties who undertake to secure the same debt, although in different stages of legal proceedings, the primary liability rests upon the last set; and bail, being sureties, are, therefore, within the same rule.

SURETIES—APPEAL BONDS AND BAIL—PRIMARY LIABILITY—ILLUSTRATION—RELEASE OF SURETIES—REIMBURSEMENT.—If the plaintiff in a civil action obtains an order for the arrest of the defendant, who is discharged upon giving bail, and the action results in a judgment for the plaintiff, whereupon undertakings on appeal are given, one to the general term, and the other to the court of appeals, with conditions that the sureties in each case will pay the amount of the judgment and costs in the event of an affirmance, the plaintiff, in the event of an affirmance at the general term and of a judgment for costs in the court of appeals, cannot, where he collects from the general term sureties the whole amount due him, except on the judgment for costs in the court of appeals, recover thereafter from the bail, either for his own benefit or that of a general term surety, anything more than

the amount due on the judgment for costs in the court of appeals, and not even that if he has released the court of appeals sureties; and, if he recovers the amount of the judgment for costs in the court of appeals, from the bail, the latter will have the right of reimbursement from the court of appeals sureties.

Action brought by Elizabeth A. Culliford to recover the sum of one thousand dollars, with interest, upon an undertaking given by defendants, as bail, to discharge one Montgomery Gadd from arrest in an action instituted against him by the plaintiff in this case. A judgment in favor of the plaintiff was affirmed, and the defendants appealed.

John A. Grow, for the appellants.

F. Spiegelberg and S. L. Wolff, for the respondent.

⁶⁶ PARKER, C. J. The facts, so far as they need be stated in order to present the point we are to decide, are as follows: Culliford, this plaintiff, in a civil action against Gadd, obtained an order of arrest; to secure the latter's discharge therefrom Walser and McHugh (these defendants) became bail in the ⁶⁷ sum of one thousand dollars that Gadd would at all times render himself amenable to the process of the court during the pendency of the action and to any mandate issued to enforce the final judgment against him; the result of the action was a judgment in favor of the plaintiff in the sum of one thirteen hundred and thirty-eight dollars and ninety cents; from such judgment an appeal was taken to the general term, upon which an undertaking was given for the purpose of staying the judgment, with Ellis and Wands as sureties, whereby they agreed to pay the amount of such judgment and costs in case of the affirmance thereof; the general term affirmed the judgment, with costs, and thereafter executions were duly issued on the judgment against Gadd to the sheriff, and by him returned unsatisfied; Culliford then commenced an action against Ellis and Wands as sureties upon the undertaking given on appeal to the general term; the day following the commencement of such action an appeal to the court of appeals was perfected, upon which an undertaking was given by Gadd, with two sureties, to pay the judgment and costs in the event of an affirmance; notwithstanding this appeal judgment was taken by default in the action brought against Ellis and Wands on the undertaking given upon the appeal to the general term, and an execution was thereafter issued thereon to the sheriff, who levied upon the real property of Ellis situated within the county. Ellis then

paid to this plaintiff, Culliford, a sum equal to the amount of the judgment recovered against him, an arrangement being made between them that Culliford should commence an action in her own name, partly for her benefit, but mainly for the benefit of Ellis, against these defendants, the bail of Gadd, and that she should account to Ellis for all moneys received by her in such action for his benefit; hence this action, which has resulted in a judgment at the trial term in favor of the plaintiff, in the penal sum of the bond, with interest and costs and an affirmance by the general term.

The plaintiff was entitled to but one satisfaction; she could have collected the entire amount of the judgment from the ^{us} sureties on appeal to the court of appeals, or from the sureties on the appeal to the general term, with the exception of the judgment for costs entered in the court of appeals, which she might have recovered from the sureties on the bond given to perfect the appeal to that court, or she could have recovered the sum of one thousand dollars from the bail, these defendants, on their failure to cause Gadd to render himself amenable to the mandate which the plaintiff caused to be issued against him to enforce final judgment. The plaintiff chose to proceed against Ellis and Wands, the sureties on the general term judgment, and she has received from Ellis all that is her due, except on the judgment for costs in the court of appeals. At the time of the commencement of this action, therefore, the only sum that she was personally entitled to recover against these defendants was the sum due on the judgment for costs in the court of appeals, which, at the time of the entry thereof, was one hundred and ten dollars and thirty-four cents. She has been allowed to recover, however, a judgment in the penal sum of the bond, for the benefit of Ellis, who claims that the primary liability rests upon the bail, and hence that he is entitled to all the rights that this plaintiff had as against them when she elected to prosecute Ellis and Wands on their undertaking.

These defendants challenge the position taken by the plaintiff and Ellis, and insist that, as between the several sets of sureties, the sureties upon the appeal to the court of appeals were primarily liable, the sureties upon the undertaking to the general term were secondarily liable, and these defendants were liable last of all. So if the plaintiff had elected to collect of these defendants in the first instance, they would have been entitled to be reimbursed by the sureties on the bond upon the appeal to the court of appeals, and if a sufficient amount could not

have been collected from them, then the defendants could have resorted to the sureties on the bond upon the appeal to the general term for the sum remaining unpaid.

In *Hinckley v. Kreitz*, 58 N. Y. 583, this court held that, as between the two sets of sureties upon appeals to the general ⁶⁰ term and to the court of appeals, the primary liability rests upon sureties on appeals to the latter court. In that case a judgment creditor released the sureties upon appeal to the court of appeals, and attempted to collect from the general term sureties the amount of the judgment and costs, but the court held that the effects of the release of the sureties upon the appeal to the court of appeals was to discharge all liability upon the part of the general term sureties upon the undertaking which they had given to pay the judgment. In the course of the opinion the court said: "We think, upon principle and authority, that the later sureties are primarily liable as between them and the first sureties, and it follows that the release of such later sureties by the creditor discharging the defendants, because it deprived them of a remedy to which they would otherwise have been entitled." That case has been recognized by the profession as establishing the rule which fixes the liability of different sets of sureties as against each other, and it has not, so far as we have observed, been departed from.

In *Chester v. Broderick*, 131 N. Y. 549, an appeal was taken to the general term from a judgment of foreclosure and sale, the amount of the bond to stay execution of the judgment on appeal being fixed at seven thousand dollars. The judgment was affirmed, and on appeal to the court of appeals the amount of the bond was fixed at nine thousand dollars. The decree was affirmed in this court and a sale of the property had, which resulted in a deficiency of between eleven and twelve thousand dollars. Thereupon the plaintiffs collected from the sureties on the second or court of appeals bond the full amount thereof, and then brought action against the sureties on the first or general term bond for the deficiency, which was about two thousand five hundred dollars. The defense interposed was that, by collecting the full amount of the bond on appeal to the court of appeals, the plaintiffs had exhausted the liability of the sureties who were primarily liable for the debts secured by both bonds, and thereby the sureties on the first bond were discharged. But this position was ⁷⁰ held by this court not well taken, and the recovery had was sustained.

The rule then being settled that, as between different sets of

sureties who undertake to secure the same debt, although in different stages of legal proceedings, the primary liability rests upon the last set, the inquiry next in order is whether bail are sureties and, therefore, within the same rule.

In *Rathbone v. Warren*, 10 Johns. 587, after judgment had gone against the principal in a bail bond, his creditor agreed with him not to issue the execution for several months, and it was held that the agreement operated to discharge the bail, who are by act and operation of law sureties and entitled to the benefit of the general principles relative to sureties. In that case, as in this, an effort was made to convince the court that bail should not be so regarded, and Mr. A. Van Vechten, the attorney general, insisted that the respondent did not stand precisely in the light of a surety, and he advanced, among other arguments, the proposition that the bail could exonerate himself from liability at any time by surrendering his principal, while in cases of suretyship generally the surety has not the power to relieve himself; but the court held otherwise.

In *Melvill v. Glendining*, 7 Taunt. 126, the bail asked the court to be discharged because, as he claimed, the creditor had, for a consideration, extended the time of the principal, and the court asserted as applicable to that case the doctrine that where a creditor gives time to the original debtor, the sureties will be discharged, and stated that the principle underlying it was that every surety has the right to come into equity and sue in the name of the original creditor, which he cannot do effectively if the creditor gives time to the original debtor.

In *Toles v. Adeo*, 84 N. Y. 222-238, the court, having under consideration a bond accepted by the sheriff in discharge of the defendant from arrest in a civil action, said: "Bail are sureties, with the rights and remedies of sureties in other cases."

If authority then be needed to establish that bail are sureties, ⁷¹ and entitled to the benefit of the general principles applicable to the relation which they bear toward their principal and his creditor, as well as toward other sets of sureties, it is at hand in this state, and thus they are brought necessarily within the rule laid down in *Hinckley v. Kreitz*, 58 N. Y. 583, and it is well that it is so, for the sake of uniformity and the necessary avoidance of confusion incident to divergent rules in corresponding relations. No good reason has been presented why bail should constitute an exception to the general rule. An attempt has been made to lay hold of the argument made by the court in support of the rule established in *Hinckley's case*, to sustain

the claim that the rule should not apply to bail, because some of the reasoning that led to its adoption is not applicable. Frequent attempts of this character are made to break down rules established by the courts for the guidance of the profession and the public, but they should not be allowed to succeed unless a substantial reason exists for the creation of an exception, and no such reason exists in this case. Moreover, an examination of the authorities considered in that case make it apparent that the court was attempting to ascertain and establish the true rule as to the primary liability of sureties where more than one set is obligated to pay the same debt. Among the cases cited with approval in support of the rule laid down by that case, in so far at least as it treats of the superior obligation between two sets of sureties to pay a debt, was *Parsons v. Briddock*, 2 Vern. 608.

Where the principal in a bond, upon which were sureties, was sued and arrested and then gave bail, the sureties in the original bond having been sued and paid the judgment, it was decreed that they were entitled to an assignment of the judgment against the bail to secure reimbursement for what they had paid.

The court next considered certain Pennsylvania cases which arose under a suit authorizing a stay of execution for a year upon giving security, it being there held that the surety for the original debt upon payment was entitled to the remedy of the creditor against the surety upon the stay: *Burns v. 72 Huntingdon Bank*, 1 Penr. & W. 395; *Pott v. Nathans*, 1 Watts & S. 155, 37 Am. Dec. 456; *Schnitzel's Appeal*, 49 Pa. St. 23.

Without further referring to the authorities considered by the learned judge who wrote the opinion of the court, we observe that he was without direct authority establishing the primary liability as between two sets of sureties who have promised to pay the same judgment, one set on one stay on an appeal to the general term and the other on another stay on an appeal to the court of appeals. He therefore presented some of the authorities bearing upon the general subject affecting the question of primary liability as between different sets of sureties, to the end that the rule should be clearly pointed out, as well as applied to the case in hand, thus preventing future legal controversy by making it possible for would-be sureties to be correctly advised of the character of their liability as between themselves and prior sureties.

This plaintiff, therefore, is not entitled to a recovery against these defendants for anything more than the amount due on

the judgment for costs in the court of appeals, and not even to that if she has released the sureties on the court of appeals bond, as these defendants claim. So far as we are advised by the present record, we are inclined to the view that this claim is not well founded, though we refrain from passing upon it, as additional facts may, perhaps, be presented upon a new trial; but if the amount of the judgment for costs in the court of appeals shall in this action be recovered of these defendants, they in turn will have the right to reimbursement from the sureties on appeal to the court of appeals.

The judgment should be reversed and a new trial granted to defendants, with costs in this court and the court below.

All concur, except Gray and Martin, JJ., absent.

Liability as Between Different Sets of Sureties.*

Primary Liability.—As between different sets of sureties who undertake to secure the same debt, although in different stages of legal proceedings, the New York cases are clear that the "primary liability" rests upon the last set: See principal case. And we understand that the one who is "primarily" liable upon an obligation is the one who, in equity and good conscience, should be first called upon to discharge it. See the principal case. Thus, if a new undertaking is given in that state upon an appeal to the court of appeals, for the judgment and costs, the "primary liability," as between the two sets of sureties, rests upon the latter, and if the judgment creditor releases them, his act discharges the former sureties: *Hinckley v. Kreltz*, 58 N. Y. 583. If a surety becomes dissatisfied with his responsibility, and seeks to be relieved, the court cannot substitute a new surety so as to discharge the former from his contract. But there is nothing to forbid its requiring a new security, which, as between the sureties themselves, shall be the "primary" one, leaving the former only collateral: *Glenn v. Wallace*, 4 Strob. Eq. 149, 53 Am. Dec. 657. The doctrine of primary and secondary liability has been applied to administration bonds, where more than one bond has been given. "As a general principle," says Simpson, C. J., in *Bobo v. Vaiden*, 20 S. C. 271, 278, "it has been settled that the second bond becomes the primary security, and the first is at least suspended until the second is exhausted. True, the first bond cannot be entirely discharged, so far as the parties interested in the estate are concerned; but as between the sureties to the two bonds, the second stands in the front rank and must protect the first." Hence, if a surety on an administration bond petitions for relief, and a new bond is required and given, the second bond becomes the primary

*REFERENCE TO MONOGRAPHIC NOTES

Right of one surety to enforce contribution from another, and the remedies for its enforcement: 10 Am. St. Rep. 639-647.

Liabilities of sureties on appeal bonds: 38 Am. St. Rep. 702-719.

security, not only as to the surety who petitioned, but also as to the other sureties on the first bond: *Bobo v. Vaiden*, 20 S. C. 271. The effect of releasing an administrator's sureties, who petition for release, is to make the second set of sureties primarily liable to the extent of their bond. If they prove insufficient, the first sureties are answerable to the date of their release. The second set must, it is said, account, first, for any default after their suretyship, and then for any that may have occurred before: *Morris v. Morris*, 9 Heisk. §14, 822.

Cosureties—Different Bonds—Contribution.—It is a general rule of equity that all persons liable for the same debt, although by different obligations, executed at different times, are regarded as cosureties, and will be compelled to contribute to the payment of any loss that a cosurety may sustain by having discharged the debt. In other words, the relation of cosuretyship may be said to exist where it appears that there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments. Nor does it alter the relation, or affect the right to compel contribution, that the sureties are jointly or severally, or jointly and severally bound; nor that they are bound at different times and by different instruments. The duty of contribution among sureties results from equitable principles, and not from contract. Hence, it exists, whether they are bound jointly or severally, by the same or different instruments, and although one did not know the other was bound with him; nor is the order in which they become bound material, or the relative number of sureties on the several different obligations or instruments of any consequence. The only question as to such duty is, whether they are, in fact, sureties for a common principal, in relation to one and the same obligation: *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270, 1 Cox, 318; *Snow v. Brown*, 100 Ga. 117, 120; *Thompson v. Dekum*, 32 Or. 506, 512; *Kellar v. Williams*, 10 Bush, 216; *Whiting v. Burke*, L. R. 10 Eq. 539; *Bosley v. Taylor*, 5 Dana, 157, 30 Am. Dec. 677; *Hutchison v. Roberts*, 6 Del. Ch. 112; *Norton v. Coons*, 3 Denio, 130; *Wells v. Miller*, 66 N. Y. 255; *Mayhew v. Crickett*, 2 Swanst. 185, 1 Wils. Ch. 418; *Pendlebury v. Walker*, 4 Younge & C. 424; *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607; *Armitage v. Pulver*, 37 N. Y. 494.

Thus, a bond given by an administrator, upon being ruled to give additional security, is simply additional security. The sureties in each bond are, therefore, cosureties and may be compelled to contribute: *Cobb v. Haynes*, 8 B. Mon. 137, 139. So, where successive bonds, with the same penalties, given by an executor for the performance of his duties, are cumulative security, the liability of the sureties thereon, for contribution, is the same as if all had signed the same bond: *Thompson v. Dekum*, 32 Or. 506, 513; and, where successive bonds are given for the faithful discharge of a trust, such as performing the duties of an administrator, all the bonds given during the continuance of the office are cumulative, and the sureties on each bond stand in the relation of cosureties to the sureties on all the other bonds: *Pickens v. Miller*, 83 N. C. 543, 547.

So, if an administrator gives two bonds, one when letters are issued, and the other when real estate is about to be sold, the sureties on the two bonds are liable to contribution inter sese, where each bond has the same condition, and the sureties have assumed a common burden: *Powell v. Powell*, 48 Cal. 234. The second bond of an administrator, being an additional and cumulative security for the faithful discharge of his duties, have been held to be retrospective as to pre-existing and continuous breaches: *Pickens v. Miller*, 83 N. C. 543, 547.

The same may be said of the bonds of a guardian. If he gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of cosureties to the sureties on every other bond: *Jones v. Hays*, 3 Ired. Eq. 502, 44 Am. Dec. 78; *Jones v. Blanton*, 6 Ired. Eq. 115, 51 Am. Dec. 415; *Loring v. Bacon*, 3 Cush. 465; *State v. Fields*, 53 Mo. 474. A surety on a guardian's bond is not discharged from his liability by the guardian's giving a new bond with other sureties, whether the new bond is voluntary or given by order of the court: *Jones v. Blanton*, 6 Ired. Eq. 115, 51 Am. Dec. 415; *Forbes v. Harrington*, 171 Mass. 386; *Field v. Pelot*, McMull. Eq. 369; *Loring v. Bacon*, 3 Cush. 465. The court cannot substitute a new surety so as to discharge the old one from his contract: *Field v. Pelot*, McMull. Eq. 369. If a guardian, having given a bond as such, with surety, afterward, on the death of the surety and upon order of the court, gives an additional bond, with other sureties, conditioned like the first, but with a larger penalty, the sureties on both bonds are cosureties, and, as such, mutually liable to contribution: *Stevens v. Tucker*, 87 Ind. 109. If the sureties of a guardian petition, under the statute, for relief, and the court orders new sureties to be given, the obligation of the bond given by the new sureties extends to the entire guardianship, retrospective as well as prospective. Such a bond is, at least, an additional and cumulative security for the ward: *Bell v. Jasper*, 2 Ired. Eq., 597; *Field v. Pelot*, McMull. Eq. 369. If a guardian has given a bond as such, but subsequently receives other funds, and is afterward required to give an additional bond, the sureties upon the first and second bonds are liable to pro rata contribution: *Odom v. Owen*, 2 Baxt. 446.

If a sheriff is required, by statute, to renew his bond annually, the sureties on his official bond, and the sureties on his additional or renewal bond, are cosureties from the date of the execution of the renewal bond, and are jointly bound to answer for the acts of their principal. A surety on his renewal bond is, therefore, answerable, in an action for contribution, to a surety on the sheriff's official bond: *Ketler v. Thompson*, 13 Bush, 287. The sureties upon the general tax bond of a sheriff are answerable for all taxes collected by him, whether general or special. The sureties on his general bond are answerable for any defalcation in the general taxes, and are also answerable for a ratable share and share alike with the sureties on the sheriff's special tax bond, as if they had signed it, for any defalcation in the special taxes: *Cherry v. Wilson*,

78 N. C. 164; but, if the entire defalcation as to the special taxes is collected out of the sureties on the general bond, they are entitled to contribution, share and share alike, from the sureties on the special tax bond, as if they had signed it: *Cherry v. Wilson*, 78 N. C. 166. A surety who pays the whole amount for which he and other sureties are bound to the same person, for the performance of the same conditions, may compel contribution from such other sureties, although they are not bound by the same bond: *Bosley v. Taylor*, 5 Dana, 157, 30 Am. Dec. 677.

An examination of the principal case will show that where two undertakings on appeal in the same cause have been given in the state of New York, one on an appeal to the general term, and the other on an appeal to the court of appeals, both undertakings being given to pay the judgment and costs, in the event of any affirmance, the fact that the liability of the sureties, who are primarily liable for the judgment secured by both bonds, becomes exhausted, does not discharge the sureties on the other or first bond; that the entire amount of the judgment, in case of affirmance, may be collected from the sureties on appeal to the court of appeals, or from the sureties on the appeal to the general term, with the exception of the judgment for costs entered in the court of appeals; and that, if the amount of the judgment for costs in the court of appeals is recovered from the bail upon a discharge from an order of arrest, the latter are entitled to reimbursement from the sureties on the appeal to the court of appeals: See, also, *Chester v. Broderick*, 131 N. Y. 549, commented upon in the principal case. The liability of sureties on appeal bonds is the subject of a monographic note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 702-719.

A new probate bond given simply as an additional security does not displace the original bond, without some action as to it, or as to the liability of the sureties thereon, notwithstanding a misapprehension of the judge and of the parties as to the reason for filing it. Both bonds are valid, and the sureties on each, after a breach thereof, are answerable in proportion to the several liabilities assumed by them: *Brooks v. Whitmore*, 142 Mass. 399.

If a judgment is enjoined by the principal debtor, who executes an injunction bond, with a third person as surety, the surety, upon a dissolution of the injunction, is answerable for the debt enjoined before the surety in the judgment, where the latter was not a party to the injunction; but, where the surety on the injunction bond is adjudged insufficient, and another bond is executed with other sureties, the sureties on both bonds, upon a dissolution of the injunction, are equally answerable: *Bentley v. Harris*, 2 Gratt. 357. Compare *Harnsberger v. Yancey*, 33 Gratt. 527, 540.

The original sureties on an instrument are sometimes expressly released by statute where a new obligation is given. Thus, by express provisions of the statute of Virginia, a new bond given by administrators relates back to the time of the qualification of the administrators, and binds the obligors therein for the faithful discharge of the duties of their office, from that time, as effectually as

if the new bond had then been executed: *Lingle v. Cook*, 32 Gratt. 262. So where the statute, in terms, renders the sureties on the new bond liable for all of the administrators, from the date of the grant of their letters, this seems clearly to manifest an intention to release the securities on the original bond, by the execution of the new one, not only from subsequent, but from all past acts, of their principals. The evident design of such a statute is to render the first bond as inoperative as though it had never been given, and to transfer the liability to the new sureties: *People v. Lott*, 27 Ill. 215, 223.

Who are not Cosureties—Contribution.—While it is true that, if there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all his cosureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens, this doctrine does not apply where the debt or obligation, for which there are two or more sureties for the same principal debtor, is not the same: *Hutchison v. Roberts*, 6 Del. Ch. 112; *Rosenbaum v. Goodman*, 78 Va. 121; *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607; *Langford v. Perrin*, 5 Leigh, 552. Thus, the rule does not apply to a case where some are sureties on a replevin, and others on a supersedeas bond, as the liabilities imposed by the respective bonds are of different natures: *Kellar v. Williams*, 10 Bush, 216. So a surety on a replevin bond is not a cosurety with a surety on an injunction bond, and is not answerable by way of contribution to him: *Brandenburg v. Flynn*, 12 B. Mon. 397, 398. So, a surety upon a guardian's bond, after obtaining his discharge under section 1817 of the Code of Georgia, "although liable to the ward for any past default of the guardian, is not liable to a surety of the guardian upon a second bond who has answered for that default in consequence of his own statutory liability upon the second bond. This liability of the second surety is primary, as between himself and the first surety, and he has no right either of indemnity or of contribution from the latter": *Tittle v. Bennett*, 94 Ga. 405. And a surety on a second bond given by the guardian under the provisions of section 2533 of the Civil Code of that state, after making good a devastavit of the guardian which occurred prior to the release of a surety on the first bond executed, is not entitled to contribution from such first surety on account of such devastavit: *Snow v. Brown*, 100 Ga. 117, 119.

In this case, Little, J., in rendering the opinion of the court, said: "In view of the fact that, under our statute, section 2533 of the Civil Code, the surety on the first bond who applies for his release is not and could not legally be released from any liability arising from a breach of the bond anterior to such release, so far as the rights of the obligee in the bond are concerned, and that the surety on the second bond, by the terms thereof, is made liable likewise for any devastavit occurring while the first bond was in force and

prior to the release of the surety on the latter, it might be argued, plausibly, that as to such a devastavit there is a common liability, relatively to the obligee of the respective bonds, as between the first and second surety; that the first surety being still bound for all breaches occurring prior to his release, and the obligation of the second surety relating back so as to embrace liability also for such breaches, there is established a several liability, as between the first and second surety, springing from the same principal and growing out of the same transactions; and therefore as to all such transactions the relation of cosurety would exist. As a general proposition, we are inclined to the opinion that, under such a state of facts, the doctrine would be applicable. The rule cannot, in reason, be limited to a case where the liability of each surety is equal as to amount and equally comprehensive as to the subject matter upon which the suretyship operates. The liability may be common as to a given transaction and separate and distinct as to others. It makes no difference that they are bound in different sums, except that contribution could not be required beyond the sum for which they had become bound: *Craythorne v. Swinburne*, 14 Ves. 160, 169; *Mayhew v. Crickett*, 2 Swanst. 185, 192; *Stirling v. Forrester*, 3 Bligh, 575, 596. The fact that the obligations of the second surety embrace transactions which are distinct and foreign to the liability of the first surety does not render the liability, relatively to the obligee in the respective bonds, for which the first surety is held liable, any the less common to the first and second surety. The first and second sureties are severally liable for all defalcations prior to the release of the first surety, and the second surety separately liable for all defalcations occurring after such release. But for our statute, we should be inclined to hold that, as to a devastavit occurring prior to the release of the first surety, the first and second sureties were cosureties and hence entitled to contribution between themselves. However, under our interpretation of the statute, we feel constrained to hold the converse of the proposition. It is clearly the purpose of the statute to release the outgoing surety as far as possible. It is obvious that, as between himself and the obligee of the bond, he cannot be released from liabilities springing from breaches of the bond occurring before his release; but whenever such circumstances exist as will allow him to be released from further liability, he is entitled to as full protection as is obtainable at the time of his release. The privilege to the guardian to continue his trust by giving another bond and surety has the effect to postpone the right of the first surety to have an accounting from his principal, and thus possibly deprive him of means and measures of protection afterward lost. The original bond being, presumably at least, ample to protect the obligee thereof for all devastavits occurring while it is of force, it could not be said that it was the purpose of the statute, in making the second surety liable for past waste, to alone protect the interests of the obligee of the respective bonds, but the principal object sought to be accom-

plished by this retroactive feature of the second bond is to afford to the released surety as much indemnity as possible, in view of the disadvantages to him attendant upon the postponing of his right to have his principal brought to an accounting. The release of the first surety could not operate to exonerate him from liability to the obligee of the bond for breaches made prior to such release, for the rights and liabilities of the respective parties were then fixed and vested, but there is no legal obstacle to imposing upon a surety, who voluntarily assumes liability under a second bond, a primary liability, as between himself and the first surety, for all past as well as future waste. Such a construction has heretofore been placed on the statute now under review, by this court, in the case of *Sutton v. Williams*, 77 Ga. 570, in which it was held that 'where a guardian was appointed and gave bond, and subsequently one of the sureties, upon application, was released and discharged, and the guardian was required to give a new surety, which he did, on a subsequent proceeding by bill in equity on behalf of the wards, to recover from all the sureties for a devastavit of the guardian, the liability of the discharged surety and the second surety was not joint, but several, both being primarily liable to the wards, and, as between themselves, the last surety being first bound.' In commenting upon the statute, Justice Blandford says: 'It is manifest that the last surety shall be liable first for any waste of the guardian, and while the sureties on both bonds are liable to the wards severally, primarily, as between themselves, the last sureties on the bond are first bound. . . . It is apparent, therefore, not only that the first and last sureties are not cosureties, but that the bond of the last surety stands as an indemnity to the first surety, and that, if the latter is forced to pay off and discharge any devastavit of the guardian occurring before his release, he is entitled to recover the same of the second surety. Of course, if it should appear that fraud or deceit in concealing a past devastavit had been practiced by the first surety upon the last surety, a different question would arise': *Snow v. Brown*, 100 Ga. 117.

If two parties are bound as principal and surety for a debt or other engagement, and a third afterward, at the request of the principal, binds himself as surety for such debt or engagement, the two sureties, in the absence of any agreement to the contrary, become cosureties of the same principal and for the same debt or engagement. "But, where there is a judgment or decree against a principal debtor and his surety, and a third party, at the instance of the principal and for his sole benefit, and without the assent of the surety, enters as surety for the principal in an obligation, the effect of which is to suspend the execution of the judgment or decree and thus prejudice the rights of the first surety, the equity of the latter is superior; and it seems to be well settled that, in such case, the second surety would not be entitled to contribution from the first, and there is much authority for the proposition that the first would be entitled to indemnity from the sec-

ond. This principle has been applied to injunction bonds, bail bonds, prison-bonds bonds, forthcoming bonds, and appeal bonds": *Harnsberger v. Yancey*, 33 Gratt. 527, 540.

Where the obligations of the different classes of sureties are for wholly distinct things, and have no relation to, nor operation upon one another, though they may arise out of the same principal indebtedness, there is no claim from one class upon the other either for contribution or indemnity: *Rosenbaum v. Goodman*, 78 Va. 121, 127. So, if sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no liability for contribution between them: *Coope v. Troynam*, 1 Turn. & R. 426.

Controlling Liability by Contract.—If several persons are sureties for the payment of one sum of money, though by distinct instruments, and one pays more than an equal share of that sum, he may have contribution from his cosureties; but the sureties may arrange their liabilities and priorities as they will, and they may, by contract, arrange that each surety shall be answerable only for a given portion of one sum of money. In such a case there is no liability of contribution between them: *Pendlebury v. Walker*, 4 Younge & C. 424; *Glenn v. Wallace*, 4 Strob. Eq. 149, 53 Am. Dec. 657. A surety may stand upon the express terms of his contract. Note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 703; and the liability of contribution among cosureties is limited by the extent of their respective contracts; as, where they are for different sums: *Craythorne v. Swinburne*, 14 Ves. 160, 165. Sureties may, by agreement among themselves, so far sever their unity of interest and obligation as to terminate the right of contribution: *Robertson v. Deatherage*, 82 Ill. 511. A second surety may qualify his obligation in such a manner as not to be liable to the first; but then, if he has the debt to pay, he cannot call upon the others: *Norton v. Coons*, 3 Denio, 130. So a surety on one bond is not entitled to contribution from a surety on another, if the latter bond was not to be pursued, unless the principal could not obtain payment from the sureties on the former: *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607.

Contribution—Basis of Right and Liability—General Principles.—The right to contribution between cosureties depends upon principles of equity rather than upon contract: *White v. Banks*, 21 Ala. 705, 56 Am. Dec. 283; *McBride v. Potter-Lovell Co.*, 169 Mass. 7, 61 Am. St. Rep. 265; and the foundation of the doctrine is the fact that one has paid more, and another less, than his share: *Wells v. Miller*, 66 N. Y. 255; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. Rep. 635; and monographic note thereto on the right of one surety to enforce contribution from another, and the remedies for its enforcement. A surety's right to contribution from his cosurety is an equity which springs up where the relation is created, and is fully consummated when the surety pays the debt: *Wayland v. Tucker*, 4 Gratt. 267, 50 Am. Dec. 76; *Nally v. Long*, 56 Md. 567; *Chenault v. Bush*, 84

Ky. 528. A surety's right of action for contribution against his cosurety does not accrue until he has paid in excess of his proportionate share of liability: *Magruder v. Admire*, 4 Mo. App. 133; *Taylor v. Reynolds*, 53 Cal. 686. A surety upon an official bond may pay a judgment thereon without compulsion, and at once sue his cosurety for contribution without demand or notice: *Mason v. Pieron*, 69 Wis. 585. So, in an action for contribution by a surety against four different guardian bonds, with different penalties and different sureties, some solvent and others insolvent, prior notice is unnecessary: *Bright v. Lennon*, 83 N. C. 183. The estate of a deceased surety is liable to contribute in a suit by a cosurety: *Johnson v. Harvey*, 84 N. Y. 363, 38 Am. Rep. 515; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Conover v. Hill*, 76 Ill. 342; and a bill may be filed against his administrator and heirs: *Stephens v. Meek*, 6 Lea, 226; and a surety may maintain a bill in equity against his cosurety for contribution, notwithstanding the fact that a court of law would grant similar relief. The jurisdictions are simply concurrent: *Broughton v. Wimberly*, 65 Ala. 549. The principles above stated in this subdivision directly concern sureties on one instrument only, but they are applicable to cases where two or more instruments, with sureties, have been given to the same person, for the performance of the same conditions, for we have shown that the sureties, in such cases, are cosureties.

Amount of Liability.—It is admitted that sureties for the same debt or obligation must divide the loss between themselves, though they are liable on obligations of different dates and with different penalties, even though one bond was given without the knowledge of the sureties on the other bond and the authorities show that the right of contribution between cosureties is limited by the extent of their contract, and is not to be extended beyond it: *Craythorne v. Swinburne*, 14 Ves. 160, 165; *Stull v. Hance*, 62 Ill. 52; *United States v. Boyd*, 15 Pet. 187; *United States v. Hough*, 103 U. S. 71, 73; that the rights and obligations of sureties, inter sese, are the same, where they undertake to secure the same debt, whether they are bound in one or several like obligations: and that where there are several distinct bonds, in different penalties, they are bound to contribute in proportion to the amount of the penalties of their respective bonds; or, as some of the cases say, they are liable "only for their proportion of the debt," or "for the amount of their respective bonds": *Armitage v. Pulver*, 37 N. Y. 494; *Smith v. State*, 46 Md. 617, 619; *Jones v. Hays*, 3 Ired. Eq. 502, 44 Am. Dec. 78; *Jones v. Blanton*, 6 Ired. Eq. 115, 51 Am. Dec. 415; *Loring v. Bacon*, 3 Cush. 465; *Stirling v. Forrester*, 3 Bligh, 575, 591; *White v. Banks*, 21 Ala. 705, 56 Am. Dec. 283. The contract of a surety is the measure and limit of his liability: *Getty v. Binnse*, 49 N. Y. 385, 10 Am. Rep. 379; and, if sureties are answerable on different and separate penal bonds, each set of sureties is answerable in proportion to the amount of the penalties of the respective bonds: *Bell v. Jasper*, 2 Ired. Eq. 597. But a surety cannot be made to pay more than the penalty of his bond: *Leggett v. Humphreys*, 21 How. 66; *Clark*

v. Bush, 3 Cow. 151; Fairlie v. Lawson, 5 Cow. 424; Rayner v. Clark, 7 Barb. 581. The penalty only can be recovered of sureties on appeal bonds: Note to Howell v. Alma Milling Co., 38 Am. St. Rep. 715. Where the right to contribution exists between the sureties on a sheriff's official bond and those on his bond as tax collector, the sureties on either bond should contribute equally for the default to the extent of the lesser penalty, and, after that is exhausted, the excess must be settled between the sureties on the larger bond: Burnett v. Millsaps, 59 Miss. 333, 337. Compare Cherry v. Wilson, 78 N. C. 164, 166.

If the penalties of several bonds are the same, the obligation of the sureties, as between themselves, is the same as if all were bound by the same instrument: Deering v. Earl of Winchelsea, 2 Bos. & P. 270; Thompson v. Dekum, 32 Or. 506, 513; and this is true of official bonds. When a bond given by an official is regarded as inadequate in amount, he is sometimes required to give, and does give, what is commonly known as an "additional bond," in such further amount as may be required by competent authority. The liability of the sureties on this "additional bond" does not extend to any defalcation committed by their principal prior to its date, nor does it release the sureties on the prior bond given by him from liability for any of his defalcations, past or future. If moneys have been collected prior to the execution of the additional bond, and the principal converts them afterward, the sureties upon the additional, as well as those upon the original, bond are liable for such conversion. The additional bond and that previously existing become concurrent securities for the faithful discharge of the official duties of the principal after the giving of the last bond. The term "additional bond" must not be understood as indicating that it is a bond to which resort can be had only after the remedies under the previous bond have been exhausted. On the contrary, the liability of the sureties on the two bonds is, with respect to matters occurring after giving the last bond, the same as though they had become sureties for their principal at one time and by one bond: Note to Crown v. Commonwealth, 10 Am. St. Rep. 860.

The obligation of one of two cosureties is to pay the whole debt. If he does so, he is entitled to demand contribution from the others for whatever he has paid more than his aliquot part. In other words, if he pays the whole debt, he may recover one-half from his cosurety, or the whole from the principal: Aiken v. Peay, 5 Strob. 15, 53 Am. Dec. 684; Morgan v. Smith, 70 N. Y. 537, 541. But if he pays less than the whole debt, he cannot recover from his cosurety, though he may from the principal, more than the amount which he has paid in excess of the moiety which, as between him and his cosurety, it was his duty to pay: Morgan v. Smith, 70 N. Y. 537, 542.

Insolvency.—At common law, the liability of a surety, where his cosurety had paid the debt, was his aliquot or proportional part of the payment thus made, ascertained by the number of sureties; and this was the sole measure of recovery, notwithstanding the death or insolvency of one or more of the sureties, as this did not

enlarge the other's liabilities: *Powell v. Matthis*, 4 Ired. 83, 40 Am. Dec. 427; *Stothoff v. Dunham*, 19 N. J. L. 181, 185; *Van Petten v. Richardson*, 68 Mo. 379, 381; *Browne v. Lee*, 6 Barn. & C. 689, 9 Dowl. & R. 700. In some of the states, a surety could not formerly maintain an action against a cosurety at law: *Powell v. Matthis*, 4 Ired. 83, 40 Am. Dec. 427; but now, if one of two sureties pays the whole debt, he can, either at law or in equity, call upon the other for contribution, and thus recover a half of what he has paid: *Moore v. Baker*, 34 Fed. Rep. 1, 4. Thus, where one of three sureties is insolvent, and another pays the whole debt, he may recover at law one-half thereof from the third surety: *Henderson v. McDuffee*, 5 N. H. 38, 20 Am. Dec. 557. The jurisdiction now assumed by courts of law to enforce contribution in some cases does not affect the jurisdiction belonging, originally, to courts of equity: *Wayland v. Tucker*, 4 Gratt. 267, 50 Am. Dec. 76. In some cases, however, the remedy at law is utterly inadequate; as, if there are several sureties, and one is insolvent, and another pays the debt, he can, at law, recover from the other solvent sureties only the same share as he could if all were solvent. Thus, if there are four sureties, and one is insolvent, a solvent surety who pays the whole debt can recover only one-fourth part thereof, and not a third part, against the other two solvent parties. But, in a court of equity he will be entitled to recover one-third part of the debt against each of them; for in equity the insolvent's share is apportioned among all the other solvent sureties: *Moore v. Baker*, 34 Fed. Rep. 1, 4. Contribution, in equity, is based upon the number of solvent cosureties. In other words, the insolvent ones are to be excluded, and the burden must be distributed equally between those who are solvent: *Smith v. Mason*, 44 Neb. 610, 616; *Bosley v. Taylor*, 5 Dana, 157, 30 Am. Dec. 677; *Van Petten v. Richardson*, 68 Mo. 379; *Cobb v. Haynes*, 8 B. Mon. 137, 140; *Henderson v. McDuffee*, 5 N. H. 38, 20 Am. Dec. 557; *Hitchman v. Stewart*, 3 Drew. 271; *Burroughs v. Lott*, 19 Cal. 126; *Morrison v. Poyntz*, 7 Dana, 307, 32 Am. Dec. 92; *Acers v. Curtis*, 68 Tex. 423; *Liddell v. Wiswell*, 59 Vt. 365; *Young v. Lyons*, 8 Gill, 162. Compare *Whiting v. Burke*, L. R. 10 Eq. 539—L. R. 6 Ch. App. 342. It is evident that a cosurety, in equity, is bound to contribute more than an aliquot portion of the debt, regard being had to the number of sureties, wherever one or more of the sureties happens to be insolvent. The engagement of each surety is for the whole debt, and, as each may be made liable for the whole, it is for this reason that a court of equity insists, when one surety has paid, that he may recover from such of his cosureties as are solvent that proportion of the sum paid as will establish a perfect equality between the solvent sureties, and distribute the burden between them, independently of any contract to that effect: *Young v. Clark*, 2 Ala. 264.

The cases above cited in this subdivision do not directly concern sureties to the same person on separate instruments for the same debt, but the principles stated are applicable to such cases. Thus, in *Whiting v. Burke*, L. R. 6 Ch. App. 342, a bond was executed

by a principal and two sureties, with a stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. One of the sureties did compound with his creditors, and, by the terms of the bond, the moneys secured became immediately payable. Subsequently, the plaintiff signed a separate bond to become answerable for the entire amount. The principal became insolvent, the creditor sued the plaintiff, and obtained payment of the amount due. The plaintiff then filed his bill against the solvent surety in the first bond for contribution, and it was held, affirming *Whiting v. Burke*, L. R. 10 Eq. 539, that the plaintiff was entitled to contribution from the defendant. If one surety pays the debt, all others who are bound to the same party for the performance of the same conditions, whether by the same or different bonds, are liable for contribution; and if two bonds have been given to the same party for the performance of the same conditions those of the sureties in each bond who are solvent must equally bear the burden: *Bosley v. Taylor*, 5 Dana, 157, 30 Am. Dec. 677; *Breckinridge v. Taylor*, 5 Dana, 110. The proper method of compelling contribution among sureties in a suit in equity, where more than one of the sureties have made payments on the joint indebtedness, is to add all payments together and divide the aggregate among the solvent sureties. It must be observed, however, that while a plaintiff surety, who has overpaid his share, may recover the excess of his cosureties equally, there being no intervening equity, if it does not subject any of them to the payment of more than his proper share of the entire joint liability, a surety who has paid less than his ratable share of the joint liability cannot enforce contribution, even against cosureties who have paid nothing: *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. Rep. 635. The right of contribution in equity exists between cosureties, when the principal is insolvent, and that, whether they are so by separate instruments, or by the same instrument: *Bell v. Jasper*, 2 Ired. Eq. 597. A surety suing in equity for contribution must sustain his proportion of the loss resulting from insolvency: *Acers v. Curtis*, 68 Tex. 423.

BUCHANAN v. TILDEN.

[158 NEW YORK, 109.]

HUSBAND AND WIFE—CONSIDERATION FOR COVENANT ON BEHALF OF WIFE.—It is not the full measure of the legal and moral obligations imposed upon a husband by the common law simply to provide for his wife the necessities of life, such as food, raiment and shelter, but it is his duty, if opportunity offers, to make provision for her against that day when he may be incapacitated by disease or removed by death; and this obligation is one that a court will recognize as a sufficient consideration to support a covenant on her behalf.

HUSBAND AND WIFE—UNITY OF, TO AID ENFORCEMENT OF COVENANT FOR WIFE'S BENEFIT.—The common-

law unity of husband and wife survives for the purpose of aiding the wife to enforce a covenant for her benefit made by her husband, and which equity and good conscience approve.

HUSBAND AND WIFE—PROMISE TO HIM FOR HER BENEFIT—WIFE'S RIGHT OF ACTION ON.—If an heir-at-law and next of kin of one who died testate desires to contest a bequest, in the will, of a large amount of property, which, if invalid, would fall to the next of kin, but has no means to conduct the litigation, and obtains a loan of money, for the purpose, from a man whose wife has an equitable interest in the suit, by reason of her adoption by a relative of the testator, upon a promise to the husband that, in case of success, the contestant will pay to the wife the sum of fifty thousand dollars, the wife is entitled to recover on the contract, where the contestant succeeds in obtaining the fund for the next of kin, whether the mere relation of husband and wife would alone constitute a sufficient consideration to enable her to maintain the action, for her equities are such, when considered in connection with the duty of her husband to provide for her future, and with the fact that, with that purpose in view, the money was procured for the contestant to institute and pursue the necessary litigation to secure the fund to which her equities related, that, all taken together, they are sufficient to sustain her action.

Action on contract. The defendant, George H. Tilden, needed money in order to prosecute an action to set aside certain provisions of the will of Samuel J. Tilden, deceased. He applied to the plaintiff's husband for that purpose, and the latter procured a man named Dun to advance the money. The agreement between the defendant and the plaintiff's husband was that, in the event of the success of the action, in view of the assistance rendered by the latter, as well as by Dun, the defendant would become responsible for the payment to the plaintiff, Adelaide E. T. Buchanan, of the sum of fifty thousand dollars. The action was successful, and the defendant repaid the money loaned. In addition, he gave to the plaintiff a sum of eight thousand five hundred dollars, but she brought this action to compel the payment by the defendant of the whole sum mentioned in the agreement. A judgment for the plaintiff, for fifty-four thousand, four hundred and twenty-one dollars and eighteen cents, entered upon a directed verdict, was reversed by the court below, and the plaintiff appealed.

Louis S. Phillips and William B. McNiece, for the appellant.

Delos McCurdy, for the respondent.

¹¹¹ BARTLETT, J. At the close of plaintiff's case both parties moved for a directed verdict, and neither asked to go to the jury on any question.

¹¹² The trial judge thereupon directed a verdict for the plaintiff. The appellate division, with a divided court, reversed the

judgment in plaintiff's favor entered upon the verdict and ordered a new trial. The plaintiff has appealed from that order, stipulating for judgment absolute in case of affirmance, and presents for our determination a single question of law arising upon undisputed facts.

Before stating that question reference will be made to the material facts. The plaintiff is the adopted daughter of Moses Y. Tilden, a brother of the late Samuel J. Tilden. The defendant is an heir-at-law and next of kin of Samuel J. Tilden.

On the twentieth day of October, 1886, the defendant began an action against the executors of the estate of Samuel J. Tilden and others, praying judgment that the thirty-fifth article of Mr. Tilden's will be adjudged void, and that the property therein mentioned be declared undisposed of by any provision thereof.

The defendant, being without means to prosecute this action, applied to Robert D. Buchanan, the husband of the plaintiff, for assistance in raising the funds necessary to carry on the litigation. Buchanan expressed his willingness to aid defendant if certain arrangements were made, and said that his uncle, Robert G. Dun, might be willing to advance the money required.

The defendant expressed himself as willing "to do anything in the world to raise the money—to make any arrangement that was reasonable," and said to Buchanan that if the contest was successful Mrs. Buchanan "should come in share alike with the rest of them." It was evidently within the contemplation of the parties that if this action of the defendant was successful the result would be that as to a very large part of his estate Mr. Tilden died intestate, and that while the plaintiff, as an adopted child of Moses Y. Tilden and not of Samuel J. Tilden's blood, might take no part thereof, yet there were the strongest moral and family reasons why she should be regarded as an heir-at-law and next of kin.

113 Buchanan induced Dun to make certain necessary advances to the extent of five thousand dollars, and Dun consented to do so solely on the ground that plaintiff was to share the fruits of a successful contest, he being unacquainted with the defendant.

This portion of the money was advanced by Dun about the time defendant began his action, and he was then presented to Dun and repeated to him the promise in regard to plaintiff sharing alike with the rest of the heirs that he had made to her husband. In February, 1887, the defendant asked Buchanan if he could raise more money.

Buchanan testified that in response to this application, "I told him that I thought before any more money was talked about that the arrangement that had been talked about had better be whipped into line, . . . and he said they were all perfectly willing to share and share alike in that matter. I said that does not satisfy me; that is not what I want; I want some positive agreement. After considerable further talk he said that his brothers and sisters were scattered; that he could not get it into shape just then, but that he had to have some more money and had to have it right away, and in order to get the money and have it right away he, on his own personal behalf, having nothing to do with his brothers or sisters in any sense, would obligate himself to pay personally fifty thousand dollars." Thereupon defendant and Buchanan went to the office of counsel, where the following letter was drawn up, signed by defendant, and delivered by Buchanan to Dun:

"New York, February 19, 1887.

"Robert G. Dun, Esq., No. 314 B'way, N. Y. City.

"My Dear Sir: It is understood between Mr. R. D. Buchanan and myself that in the event of the success of the proceedings now pending, or any which may be taken, to practically set aside the thirty-fifth section of the will of my late uncle, Samuel J. Tilden, in view of the assistance looking ¹¹⁴ to that end, which has been and may be rendered by Mr. Buchanan, as well as by yourself, that I will, and hereby do, become responsible for the payment to Mrs. Adelaide E. Buchanan, or her order, of the sum of fifty thousand dollars.

"It is further understood between us that, while I am not strictly authorized to speak in behalf of my brothers and sisters in that respect, that from what has already transpired between me and them, in the event of such success they will be disposed to act generously with Mrs. Buchanan in the premises.

"Yours very resp'y,

"GEORGE H. TILDEN."

It will be observed that this letter, while charging defendant in a fixed sum, leaves open the general adjustment between plaintiff and defendant's brothers and sisters. After receiving this written declaration of the defendant, Dun continued his advances until they aggregated over twenty thousand dollars. A long contest followed in the courts; defendant succeeded in his action, and he and others became entitled to a very large sum of money that the late Samuel J. Tilden supposed he had dedicated to public uses under the thirty-fifth article of his will.

Dun testified that the defendant had repaid his advances; that they were collected through his attorney, but he thought an action was brought against him. Defendant paid plaintiff eight thousand one hundred and fifty dollars on account of the fifty thousand dollars under the letter of February 19, 1887. As nothing more was paid, and plaintiff received no recognition from the heirs-at-law and next of kin of Mr. Tilden, she brought this action to recover the balance of the fifty thousand dollars and interest.

One of the learned judges of the appellate division thus states the question of law presented in this case: "Can a wife enforce payment in her own name where the husband renders valuable services and stipulates with the person to whom the ¹¹⁵ same are rendered that compensation therefor shall be made, not to him, but to her?" In answering this question in the negative, the main positions of the court below may be briefly stated.

While admitting that there is a distinct class of cases where promises have been made to a father, or other near relative for the benefit of a child, or other dependent relative, in which the person for whose benefit the promise was made has been permitted to maintain an action for the breach of it, and further admitting, for argument's sake, that the duty and obligation of the husband to the wife is, as a consideration, quite equal to the duty and obligation of the father to the child, yet the fact still remains in the case at bar that this is not a contract looking toward the discharge of the obligation which the husband owed to support the wife, and must, therefore, be supported, if at all, upon the mere relation of husband and wife.

The learned court then states that it has found no authority for holding that a promise made to the husband by a third person for the benefit of his wife, which was not intended to provide for her support, or to discharge the husband's duty in that regard, could be enforced by the wife.

It is also intimated that there is no disposition to extend the principle of some of the cases relating to father and child to any other relationship. As to this latter suggestion we do not think it will be seriously questioned, on principle, that the relation of husband and wife is fully equal to that of parent and child as a consideration to support a promise.

Before discussing this appeal in the light of the authorities, we have to say that, in our judgment, the learned appellate division have failed to give due weight to certain controlling features of this case. In the first place, the question formulated

by the court below does not contain what we regard as one of the most important points disclosed by the evidence, to wit, the large equitable interest the plaintiff had in this scheme to attack ¹¹⁶ the will under the provisions of the agreement made to raise funds for that purpose. This is not the case simply of a husband rendering valuable services to a third party upon the latter's promise to pay the compensation, not to him, but to his wife. While this case embraces that feature it involves the further element of the wife's joint interest in the scheme to attack the will.

It may fairly be inferred from this record that the defendant was powerless to conduct the action he had begun unless some one furnished him the funds. This assistance was rendered by Buchanan and Dun, upon the express agreement and understanding that the plaintiff should receive, in case of success, fifty thousand dollars from defendant as part of her share of the estate, and generous treatment from his brothers and sisters. Plaintiff, in equity and good conscience, as an adopted child of Moses Y. Tilden, was entitled to come in and share with the other heirs and next of kin the large fund that had been freed from the provisions of the will. When this equitable right, or interest, is coupled with the relation of husband and wife, we have presented a situation that affords ample consideration for the contract sued upon—a situation that distinguishes this action from any of the cases where the party suing upon a promise rests exclusively upon a debt or duty owed him by the promisee.

Another general feature of this case, to which we think the court below has failed to give due prominence, is the extent of the legal and moral obligation resting upon a husband to support and provide for his wife.

A brief quotation from one of the opinions below will make this point clear. The court says: "It is quite true that the husband is under an obligation to support the wife, and it may be that any contract which he makes with a third party, having for its object the carrying out of that obligation, would be enforced in the courts."

Then coming to the case at bar the court continues: "There ¹¹⁷ is no obligation, legal or equitable, here on the part of the husband toward the wife to entitle her to the performance of this contract. This was not a contract for her support, nor was it one to do anything which, under any circumstances, the husband could be compelled to do. It was simply an obliga-

tion on the part of the defendant to pay the plaintiff a sum of money, as an independent fortune for her separate estate, in case the husband rendered some service to him. So far as the plaintiff and her husband were concerned, as to this contract there were no legal relations between them; they occupied no different relations from that of any other man and woman," *et cetera*.

It seems to us that this is an entire misconception of the duties and relations existing between man and wife. It is, in effect, said that it is only the duty of bare maintenance that is a consideration sufficient to support the promise of a third party. We are of the opinion that a husband rests under other and far higher moral and legal obligations that the law will recognize as a sufficient consideration to support a covenant in favor of the wife.

There is no evidence in this case to bear out the statement that this was not a contract for the wife's support; but assuming that she had food, raiment, and shelter—the necessities of life—can it be said that these represent the full measure of the moral and legal obligations imposed upon a husband by the common law? Is it not his bounden duty, if opportunity offers, to provide for his wife against that day when he may be incapacitated by disease or removed by death. If, as in the case at bar, the husband seeks to provide for his wife, beyond the duty of furnishing food and shelter, by securing a fund to which she is equitably entitled, that may perpetuate his protecting care after he has departed this life, shall it be said that this is not an obligation that a court can recognize as a sufficient consideration to support a covenant on her behalf? We are of opinion that this broader view of the duties and obligations of ¹¹⁸ a husband is to be invoked in determining the rights of this plaintiff.

We come then to a consideration of this case in the light of precedent. The court below recognized the strong equities of the plaintiff's case and expressed regret that the action is not sustainable in her behalf. Our full discussion of the facts and the position of the court below discloses, we think, a very strong case in favor of the plaintiff maintaining this action.

While it is true that for more than two hundred years the courts of England and this country have been discussing the vexed question of when a party may sue upon a promise made for his benefit to a third party, yet we are of opinion that, under the peculiar facts of this case, the plaintiff can recover by

invoking legal principles that are well established by authority.

In order to maintain the plaintiff's cause of action, it is not necessary to invoke the principle established by *Lawrence v. Fox*, 20 N. Y. 268, and the cases that have followed it in this state, to the effect that an action lies on a promise made by the defendant upon valid consideration to a third person for the benefit of the plaintiff, although the latter was not privy to it. It will be recalled in that case one Holly loaned the defendant Fox money, stating at the same time that he owed the amount to the plaintiff Lawrence for money borrowed which he had agreed to pay the then next day; the defendant, in consideration of the loan to him, agreed to pay plaintiff the then next day.

This court, in holding that the plaintiff Lawrence could enforce that promise in an action at law, established a legal principle that the courts of England have never recognized.

The plaintiff in the case at bar, if driven to it, might doubtless derive aid and comfort from the doctrine laid down in *Lawrence v. Fox*, 20 N. Y. 268, by parity of reasoning, but we think her case rests upon very different principles.

The first case to be considered is *Dutton v. Poole*, 1 Vent., 318-332, decided in England in the reign of Charles II. The plaintiff declared in assumpsit that his wife's father being seised of certain lands now descended to the defendant, ¹¹⁹ and being about to cut a thousand pounds' worth of timber to raise a portion for his daughter, the defendant promised to the father, in consideration that he would forbear to fell the timber, that he would pay the daughter one thousand pounds.

After verdict for the plaintiff on nonassumpsit, it was moved in arrest of judgment that the father ought to have brought the action, and not the husband and wife. The court said: "It might have been another case if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and the child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." The judgment was affirmed in the exchequer: *Dutton v. Poole*, 2 Lev. 212, Raym. 302.

In one of the opinions of the appellate division in the case at bar, it is stated that *Dutton v. Poole*, 1 Vent. 318, has been repudiated by the English courts in *Tweddle v. Atkinson*, 101 Eng. C. L. R. 393. A careful examination of this latter case shows that Justice Blackburn, while attacking *Dutton v. Poole*, 1 Vent. 318, says: "We cannot overrule a decision of the exchequer chamber." Lord Mansfield said of *Dutton v. Poole*,

1 Vent. 318, a hundred years later, that it was difficult to conceive how a doubt could have been entertained about the case: *Martyn v. Hind*, Cowp. 443, Doug. 142. It has also been repeatedly followed in this state.

The learned counsel for the defendant, in an able and comprehensive brief, complains that *Dutton v. Poole*, 1 Vent. 318, has on several occasions been cited to sustain the broad doctrine that a stranger to the consideration and to the promise may maintain an action on a contract. He points out that such an alleged erroneous citation appears in *Schermerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304, and that it has led to confusion in subsequent cases. We are not concerned at this time whether this is a just criticism or not, as there can be no doubt that *Dutton v. Poole*, 1 Vent. 318, rests upon the nearness of the relation between father and child, and to this extent is undoubted authority.

¹²⁰ In *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396, *Dutton v. Poole*, 1 Vent. 318, is approved and followed, and Chancellor Kent also recognizes the principle contended for in this case, that the consideration of natural affection, and to make sure the maintenance of a wife in case she survived her husband, is "very meritorious."

There were two principal points decided by Chancellor Kent in this case—the first being that although a deed from a husband directly to his wife is void in law, yet, where the conveyance of the husband is for the purpose of making a suitable provision for the wife "in case she should survive him," equity will lend its aid to enforce its provisions. The second point held that where a husband conveyed land to his son, for a nominal sum, on his covenanting to pay an annuity to his mother during her widowhood, that the wife could sue on this covenant so made for her benefit, and that an attempted release of the son from the covenant by the husband, in his lifetime, was fraudulent and void.

The learned chancellor said: "But if the deed of 1808 was out of the question, I should then have no difficulty in declaring that the defendant was bound to pay her the stipulated annuity, or the gross sum of four hundred dollars in lieu of it, on her releasing," et cetera. "The relationship between husband and wife was sufficient to entitle the plaintiff to her action upon the covenant to her husband, and which was made for her benefit. The consideration inured from the husband, and arose from the obligations of that relation," et cetera.

The chancellor then comments approvingly and at length upon *Dutton v. Poole*, 1 Vent. 318, points out the subsequent commendation of it by Lord Mansfield, and concludes by saying: "The same doctrine appears in the more early case of *Starkey v. Mill*, Style, 296, and it has had the sanction also of Mr. Justice Buller in *Marchington v. Vernon*, 1 Bos. & P. 101, in notes, but it is quite unnecessary to dwell longer on this second point."

¹²¹ While the chancellor allowed relief to the plaintiff by enforcing her deed in equity, yet he distinctly held that she had the additional remedy of an action on the covenant between her husband and the son if there were no deed, by reason of the relations and obligations of husband and wife, resting his decision squarely on the case of *Dutton v. Poole*, 1 Vent. 318:

With this case approved by Lord Mansfield, Justice Buller, and Chancellor Kent, and followed in this state, it is not of controlling importance that the doctrine of this and other early cases is said to be questioned in England at the present day.

In a jurisdiction where the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, is the settled law, there is no difficulty in sustaining both in law and equity the kindred principle announced in *Dutton v. Poole*, 1 Vent. 318.

It is quite impossible to follow the learned counsel on both sides of this case in the exceedingly interesting and exhaustive discussion of the questions involved, as the limits of an ordinary opinion forbid it.

We shall content ourselves with the citation of but one more case. In *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20, this court held that the relation of parent and child, even between a father and his illegitimate daughter, was a sufficient consideration for a contract made by him with the relatives of his unfortunate child to pay for her support and maintenance, and that she could enforce it by action. The learned judge writing for the court in that case, in an opinion that does honor to his heart as well as his intellect, quotes with approval *Dutton v. Poole*, 1 Vent. 318.

We see no valid distinction in principle between the relation of parent and child and husband and wife as affording an ample consideration for covenants inuring to the benefit of the child or wife. The relation of husband and wife has been twice recognized in this state in cases just cited as a sufficient consideration for supporting a covenant in the wife's favor, and amply sustains the plaintiff's cause of action in the case at bar.

This court has recently held that while the common-law rule that husband and wife are one has been to some extent abrogated ¹²² by special legislation, yet there are situations where that unity still exists: *Wetmore v. Wetmore*, 149 N. Y. 520, 529, 52 Am. St. Rep. 752; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361.

The case before us illustrates a situation where that unity survives for the purpose of aiding the wife to enforce a covenant for her benefit made by her husband, and which equity and good conscience approve.

The appellate division refer to *Durnherr v. Rau*, 135 N. Y. 219, as "a case while not directly in point is in its controlling principles adverse to the plaintiff's right to maintain this action."

We think that case has no application to the one before us. The husband of plaintiff conveyed to the defendant certain premises, the latter covenanting to pay all encumbrances on the premises "by mortgage or otherwise."

The deed declared that the wife (the plaintiff) reserved her right of dower. By the foreclosure of mortgages on the premises, existing at the time of the conveyance and in which the wife joined, her dower interest was extinguished. The wife sued on the defendant's covenant in the deed to pay all encumbrances, and sought to recover the value of her dower interest cut off by the foreclosure. This court held that the covenant was with the husband alone, as the wife was not bound to pay the mortgages, and that the joinder of the wife in the mortgages was a voluntary surrender of her right of dower for the benefit of the husband, and bound her interest to the extent necessary to protect the securities.

It is perfectly clear under this state of facts that the husband rested under no duty to protect the wife's dower interest. There was no legal or equitable obligation which the wife could lay hold of to enable her to sue on the covenant. The court points out that it is not sufficient that the performance of a covenant may benefit a third person, but it must have been entered into for his benefit.

The case at bar is decided upon its peculiar facts. We do not hold that the mere relation of husband and wife alone constituted a sufficient consideration to enable the plaintiff to ¹²³ maintain this action. We deem it unnecessary to decide that question at this time. What we do hold is, that the equities of the plaintiff were such that when considered in connection

with the duty of her husband to provide for her future, and with that purpose in view, the money was procured for the defendant to institute and pursue the necessary litigation to secure the fund to which her equities related, all taken together, were sufficient to sustain the plaintiff's action.

The order of the appellate division granting a new trial and the judgment entered thereon should be reversed and the original judgment in favor of the plaintiff and against the defendant affirmed, with costs in all the courts.

GRAY, J., dissented. He thought that the order appealed from should be affirmed, and that any other doctrine than that laid down by the appellate division would be without support in principle, or in the cases. "The question is," he said, "whether the plaintiff had a cause of action upon the contract. It seems to me that this case is not brought within that class of cases wherein a third person is entitled to enforce a promise which has been made by one person to another, because of the absence of the essential element that some liability or duty must exist from the promisee to such third person in connection therewith. As it was held in *Durnherr v. Rau*, 135 N. Y. 219, the rule is that to permit a third party to enforce such a promise, the promisee must have a legal interest that the covenant be performed in favor of the party claiming performance. How was that the case here? Could it be because of the general obligation on the part of the plaintiff's husband to support and maintain her? That, of course, is a well-recognized obligation in the law; but did the contract in question have that for its object? I cannot so regard it. It related solely to the payment of a large sum of money contingently upon the success of a certain litigation, of which the defendant was the promoter, and promised a reward or compensation to the party with whom made for his aid in furnishing the needed moneys. It is perfectly clear that this contract was not based upon marital obligations; but that it was simply a mode, suggested by the husband and adopted by both parties, for the payment, by the defendant, of the consideration for his, the plaintiff's husband's, services in the matter. It does not appear that the plaintiff's cause of action has any other basis than the mere fact of the marital relation. While that relation imposes strong legal and moral obligations upon the husband, it is difficult to see that they involve a liability on his part to provide a separate estate for his wife, and yet, if there is not that liability, what liability was there toward the plaintiff, which furnished the element required to exist in order that the third person, the plaintiff here, might claim the right to enforce the promise? It is not necessary that the wife should be privy to the consideration of the promise; but it is necessary that the promisee, her husband, should owe some debt or duty to her, in connection with the promise, to enable her to sue upon it.

"I think that the insuperable legal objection to the plaintiff's cause of action is, that the contract in question was not one which looked toward the discharge of any obligation owing by him to her, and, therefore, is not enforceable upon the doctrine which underlies the cases where, as in the relation of parent and child, the promisee owed a duty which the contract was supposed to meet. I am prepared to admit, as it is argued, that we should recognize the obligation of the husband to support the wife to be as meritorious as the obligation of the parent to support the child, and, if this contract could be regarded in that light, I might be prepared to extend to the present case the principle of the cases referred to. But, as previously suggested, the relationship between the parties here does not help us out in endeavoring to find support for the plaintiff's cause of action, for the reason that the contract which is sought to be enforced does not bear upon the husband's obligation and is not connected with it, but simply provides for the payment of a sum of money as a compensation for his services in the event of success."

CONTRACT FOR BENEFIT OF THIRD PERSON—ACTION.—A person for whose benefit an express promise is made in a valid contract between others may maintain an action thereon in his own name, although made without his knowledge and without any consideration moving from him: *Brown v. Markland*, 16 Utah, 360, 67 Am. St. Rep. 629, and note. Compare *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618; *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431; and see monographic note to *Linnerman v. Moross*, 39 Am. St. Rep. 531-535, on promise for the benefit of a third person.

FALL BROOK COAL COMPANY v. HEWSON.

[158 NEW YORK, 150.]

WITNESSES—IMPEACHING ONE'S OWN.—A party cannot show inconsistent statements made by his own witness for the purpose of impeaching him.

WITNESSES—OFFER OF—WHEN COMPLETE.—A person is not made a witness so as to burden the party calling him with the necessity of supporting his character to the end of the trial, until he is called, sworn, and some material question is asked and answered.

WITNESSES—OFFER OF—IMPEACHMENT.—If a party calls a witness, but excuses him after he is sworn, but before any material question is asked, he is not afterward precluded from impeaching his credibility by contradicting him, where the witness gives material testimony for the other side.

APPEAL—EXCEPTION TO PART OF CHARGE.—An exception to part of a charge cannot be made to apply to any other portion than that to which it apparently relates.

Action to recover money alleged to be due for cold storage service rendered by the plaintiff company to the defendant.

As a counterclaim, the defendant interposed that the services rendered were worthless because of the plaintiff's neglect, and that he had been damaged to the amount of two thousand dollars, for which he demanded an affirmative judgment. There was a judgment below for the defendant, and the company appealed.

Albert H. Harris, for the appellant.

C. W. Kimball, for the respondent.

¹⁵¹ PARKER, C. J. The defendant called as a witness one Wilson, who, after being sworn, testified as follows: "I reside in Penn Yan. I know the defendant. I did not work for him in the spring of 1893; I was at the cold storage at that time about ten minutes in the fore part of April." No other questions were asked him, nor did he give any further testimony, and the testimony quoted had no bearing whatever upon the issues on trial. It is suggested that he was called under a misapprehension, but be that as it may, we shall assume merely in passing on the question growing out of his being called and sworn, that before any material question was asked, the party calling the witness excused him from the witness stand. When the plaintiff came to present evidence in rebuttal of the testimony adduced on the part of the defendant, it ¹⁵² called Wilson to the stand, and he gave material testimony in favor of the plaintiff. The defendant, claiming the right to cross-examine him, asked him whether he had not, at specified times and places, made to other persons statements tending to contradict the testimony given by him upon the plaintiff's examination. Wilson denied having made them, and the defendant afterward called witnesses who testified that Wilson had made the contradictory statements that he specifically denied having made; to this evidence the plaintiff objected, upon the ground that it was incompetent, in that the defendant, having first sworn and examined Wilson as a witness in his own behalf, could not be allowed to discredit him by giving testimony that he had made statements out of court differing from his statements as a witness in court. The exception to the ruling of the court admitting the evidence notwithstanding the objection, presents one of the opinions which, on this review, it is urged, call for a reversal of the judgment. Upon a motion for a new trial, this question was very carefully considered by Mr. Justice Rumsey, who reached the conclusion that no error had been committed, and the general term has affirmed the position thus taken.

As the question is a novel one, we shall briefly state the reasons that persuade us that the view taken by the learned court was the correct one.

The rule is well settled in this state that a party cannot show inconsistent statements made by his own witness for the purpose of impeaching him: *Coulter v. American etc. Ex. Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Hankinson v. Vantine*, 152 N. Y. 20, 27. This rule, which was originally established by authority, came to us from England, where, as in some of our sister states, it has since been either abrogated or modified by statute: *Stephen on Evidence*, Chase's ed., 329, note; *Selover v. Bryant*, 54 Minn. 434, 40 Am. St. Rep. 349, 21 L. R. A. 418, note; 2 *American Law Review*, 261. *Greenleaf on Evidence*, volume 1, section 442, states the reason for the rule as follows: "When a party offers a witness in proof of his cause he thereby, in general, represents him as worthy of belief. He is presumed ¹⁵³ to know the character of the witnesses he adduces; and having thus presented them to the court the law will not permit the party afterward to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him": See, also, *Wharton on Evidence*, sec. 549. The rule being established beyond change, save by legislative enactment, that one cannot impeach his own witness, the question presented here is, whether Wilson became the defendant's witness within the meaning of the rule. Would he have become such had his name been simply called without administering the oath? If not, would he have become such through the additional act of administering the oath? If the propounding of questions be also necessary, would an inquiry as to his name and residence have made him the party's witness in such a sense that he would be bound to support his character from the beginning to the end of the trial, or would that have happened only upon some questions being asked him material to the issues on trial?

It often happens that a witness is intentionally but unadvisedly called, the counsel for the moment laboring under the impression that the witness has knowledge of some fact it is desirable to establish, but before his examination has proceeded far enough to bring about an inquiry touching any material

fact to the controversy, counsel is advised by an associate, or by the party, that the wrong witness has been called, and that some other person is possessed of the information he desires to have given to the court. In such a case it would clearly seem to be a hardship that an error thus committed, which quite frequently happens, in the press of trial, should burden a party with the responsibility of having the person called treated as a witness for that purpose throughout the trial.

So far as the diligence of the counsel and our examination have disclosed, this precise question has not been before the ¹⁵⁴ court of last resort in any of the states except Connecticut, where, many years ago, in the case of *Bebee v. Tinker*, 2 Root, 160, a witness was called and sworn; as to the point regarding which the plaintiff had called him to testify, the court ruled that it was not relevant to the issue, and thereupon the defendant took the witness and asked him several questions, the answers made by him being against the plaintiff. Thereupon the plaintiff offered to introduce witnesses to impeach, which was objected to on the ground that he was the plaintiff's witness. The report of the case concludes with: "The court admitted the witnesses to impeach his character, on the ground that, although the plaintiff introduced him, yet as the defendant only improved him, in that respect he was to be considered as the defendant's witness."

In England, where the rule originated, the tendency of the courts seems to have been not to apply it unless the party has proceeded so far with the witness as to ask him some question bearing upon the issues on trial. In *Creedy v. Carr*, 7 Carr. & P. 64, a witness was called for the defendant and asked: "Are you the landlord of the house at which the fire occurred?" The witness answered: "I am, sir." Thereupon the court asked the defendant's counsel: "What do you propose to prove more?" and he replied: "My lord, I will close my case here." The counsel for the plaintiff said: "I wish to cross-examine the landlord"; and the court said: "Oh, no, I stopped his evidence." Counsel: "He was asked a question and he answered it, and I have, therefore, a right to cross-examine him." The court: "Not where the witness, as here, has only been asked an immaterial question and his evidence is stopped by the judge."

In *Wood v. Mackinson*, 2 Moody & R. 273, a witness was called for the plaintiff and sworn in the usual way, but before he had put any questions to the witness, counsel stated that he

had been misinstructed as to what the witness was able to prove, and he should not examine him at all. The witness being about to retire, counsel for the defendant claimed the right to cross-examine him, but the court said: "Here the ¹⁵⁵ learned counsel explains that there has been a mistake, which consisted in this, that the witness is found not to be able to speak at all as to the transaction which was supposed to be within his knowledge. This is, I think, such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination."

In *Bracegirdle v. Bailey*, 1 Fost. & F. 536, the plaintiff was sworn and tendered as a witness for cross-examination, but was not examined in chief. The defendant's counsel asked several questions touching his conduct and life; but the court ruled that these questions could not be asked, inasmuch as he has proved nothing "that you could cross-examine him on to discredit him."

In *Rush v. Smith*, 1 Crompt. & R. 94, it was held that a witness called to produce documents, and sworn by mistake, and a question put to him that he does not answer, does not entitle the opposite party to cross-examine him.

The general view upon which these cases proceeded is that a party does not necessarily make a person his witness by merely calling and swearing him, and we are not able to discover any good reason for disagreeing with them. On the contrary, it seems to us that the rule is not properly applicable, save in cases where a party attempts to elicit from a witness called to the stand, testimony material to the issues upon trial; that until such an attempt is made, the party has done nothing that can by any possibility affect the trial either to his own benefit or to the harm of his opponent, and, therefore, he has not offered a witness in proof of his cause and is not within the reason of the rule that burdens him with the necessity of supporting the character of the witness to the end of the trial. His mistake, however caused, has not harmed the other party, and the interests of justice can in nowise be promoted by permitting that other party to take such advantage of the mistake as will fasten upon his opponent the responsibility of vouching for the character of a witness actually hostile and from whom he has not attempted to secure any proof in the cause.

¹⁵⁶ The learned counsel for the appellant urges that his exception taken to that portion of the charge in which the court stated "that the plaintiff was not entitled to recover if the

plant was not properly run," calls for a reversal of the judgment. The defendant admitted the making of the contract upon which the plaintiff sued, but alleged that the contract had not been properly performed by the plaintiff and sought to recover his damages. In the charge to the jury the court did say that the plaintiff could not recover for the services unless it convinced the jury by a fair preponderance of evidence that it did keep the apples in proper cold storage, et cetera. But as we read the exception it was not intended to have, nor is it likely it had, the effect of calling the attention of the court to the fact that the counsel for the plaintiff claimed that there was error in the charge as to the burden of proof. The language of the exception apparently related solely to another portion of the charge, in which the court said that if the jury should find "that the rotting was the result of the plant having been improperly run, it follows that the plaintiff has not performed its contract; it also follows that whatever damage has been thus caused to the defendant, he should be compensated for in this action." This portion of the charge was not error, and the exception to which our attention is called pointed to this and to no other part of the charge.

The judgment should be affirmed with costs.

All concur.

WITNESS—IMPEACHMENT BY PARTY CALLING.—A witness cannot be impeached by the party calling him, but such party may prove the truth by other witnesses, even though they contradict the witness first called: *Blackwell v. Wright*, 27 Neb. 269, 20 Am. St. Rep. 662; notes to *Phoenix Assur. Co. v. McAuthor*, 67 Am. St. Rep. 156; *Selover v. Bryant*, 40 Am. St. Rep. 353.

WITNESSES — IMPEACHMENT — MATERIALITY OF TESTIMONY.—After a witness is sworn and testifies, the adverse party is entitled to impeach his general reputation for truth, without reference to the materiality of his testimony: *Davis v. Commonwealth*, 95 Ky. 19, 44 Am. St. Rep. 201.

EXCEPTIONS ON APPEAL must be specific, pointed, and explicit; and, if indefinite, cannot be considered: *Atkins v. Field*, 80 Me. 281, 56 Am. St. Rep. 424.

WESTON v. SYRACUSE.

[158 NEW YORK, 274.]

MUNICIPAL CORPORATIONS—SEWER CONTRACT—POWER OF CITY COUNCIL TO WAIVE COMPLIANCE WITH. If the charter of a city does not make all details in the construction of sewers the basis of the consent of property owners, but leaves such details to the common council, that body has power to waive the performance of any of the requirements of a sewer contract. Hence, after part of the work under a sewer contract has been done, but not in conformity with the contract, the common council may, before the completion of the work, so modify the contract as to make it conform with the work already done, leaving the remaining portion of the work to be constructed according to the terms of the original contract, without modification.

MUNICIPAL CORPORATIONS—SEWER CONTRACT—CERTIFICATE OF CITY ENGINEER—SUFFICIENCY OF.—If part of the work under a sewer contract has been done, but not in conformity with the specifications, and the city council passes a resolution modifying the contract so as to make it conform to the work already done, a requirement in the contract that the contractor shall obtain the city engineer's certificate of compliance with the contract as a prerequisite to payment, is satisfied by a certificate that the work done before the resolution complies with the contract as modified, while the remainder complies with it, as unmodified.

PAYMENT—EFFECT OF PRESCRIBING WAY OF.—If a way of payment is prescribed by statute, or by contract, that way must be strictly pursued.

MUNICIPAL CORPORATIONS—SEWER CONTRACT WITH—REMEDIES TO ENFORCE PAYMENT.—If a city contracts for the construction of a sewer, or other local improvement, and the only way provided for payment is through a special assessment, it is the duty of the city to collect the assessment and turn over the proceeds to the contractor; and, if it does not proceed with reasonable diligence to do so, he may and should proceed by mandamus to compel such action on its part; but, if the city disables itself from performing the contract by some act which renders the assessment void and uncollectible, or if it refuses to perform the contract, then the contractor's remedy against the city is by action for breach of the contract.

MUNICIPAL CORPORATIONS—SEWER CONTRACT—CONTRACTOR'S RIGHT OF ACTION FOR BREACH OF.—If a city contracts for the construction of a sewer, or other local improvement, provision being made in the contract that no payment shall be made until the cost has been collected by a special assessment, and the work is done according to the contract as originally executed, or as lawfully modified, the contractor is entitled to maintain an action against the city for breach of contract where the latter ignores the plaintiff's rights in the premises, not only by refusing to make the assessment, but by repudiating the contract, and entering into an agreement with others for reconstructing a portion of the sewer.

MUNICIPAL CORPORATIONS—SEWER CONTRACT—WHAT ACT IS ADMINISTRATIVE AND NOT LEGISLATIVE—POWER OF COURTS.—If a contract for the construction of a sewer is modified by a city council, by resolution, the action taken

by such resolution is not a legislative act, but an administrative one, and is not free from direct review or collateral attack in the courts.

MUNICIPAL CORPORATIONS—SEWER CONTRACT—RESOLUTION MODIFYING IS VITIATED BY FRAUD AND CORRUPTION—INVALIDITY OF, AS A DEFENSE.—A resolution passed by a city council, modifying a contract for the construction of a sewer can, if adopted by means of fraud and corruption, be declared of no effect by the courts; and the invalidity of the resolution is a good defense, on the part of the city, to an action brought by the contractor, especially if he was a guilty participant in the fraud.

MUNICIPAL CORPORATIONS—DEFENSE TO CONTRACTOR'S SUIT—WHAT MAY BE INTERPOSED.—That which a taxpayer can accomplish for the protection of a city, by a suit under the "taxpayer's act," the officers of the city, whose duty it is to protect its property from waste and injury, may bring about by a defense to an action brought by a contractor to recover on a contract for the construction of a sewer, or other local improvement.

ESTOPPEL AGAINST CITY—SEWER CONTRACT—BRIBERY—KNOWLEDGE OF OFFICERS.—A city is not estopped by the conduct of its officers from denying the validity of a resolution passed by the city council, modifying a contract for the construction of a sewer, alleged to have been brought about by bribery, where it does not appear that the officers of the city knew of the alleged bribery at the time of the several acts which the plaintiff relies upon to create an estoppel.

Action brought by John Weston, the survivor of his deceased partner, Charles Utting, to recover a balance alleged to be due upon a contract entered into between the firm of Weston & Utting and the city of Syracuse for the construction of the Kennedy street sewer. Shortly after the contract was entered into, about fourteen hundred and fifty-three feet of the sewer were constructed, and a change in the city government took place, which resulted in a change of city engineers, and the new engineer, after some investigation, reported to the common council that the sewer was not being constructed in accordance with the contract. The council suspended the work, and, after investigation, passed, on July 29, 1890, a resolution amending the contract for the work so as to make it conform to the work already done, but leaving the remaining portion of the sewer to be constructed in accordance with the terms of the contract as it originally stood. The nature of the certificate required of the engineer appears in the opinion. The other part of the sewer, it was conceded on all sides, was completed in accordance with the terms of the contract, but the city failed to levy and collect an assessment to pay for the work, and it was resolved by the city council on December 12, 1892, that the contractors, having failed, upon notice, "to take the necessary steps within three days to put their work in a condition to fulfill the terms

of their contract," had abandoned the contract. The city authorities not only refused to accept the contract as completed, but formally declared it not completed. The court decided that, as to the variations in the construction of the sewer referred to in the resolution of July 29, the common council had waived strict performance and modified the contract to that extent, and that they had also waived such defects as had come to the knowledge of the common council before passing this resolution, although the defects were not mentioned therein, and he submitted to the jury the question whether in all other respects there was a substantial performance of the contract by the contractors, and the verdict in favor of the plaintiff constituted an affirmative answer to that question. The judgment thereon was affirmed at the general term, and the city appealed.

Charles E. Ide, for the appellant.

George H. Sears, for the respondent.

281 PARKER, C. J. On this review it must be taken as established by the verdict of the jury that the plaintiffs substantially performed their contract with the defendant, except as to the construction of the first fourteen hundred and fifty-three feet of the sewer, the work upon which was done prior to the investigation by the common council. That investigation resulted in a resolution waiving performance so far as the work done was not in conformity with the plans and specifications, and modifying the contract to the extent that it should be in conformity with the work already done. The trial court decided that the resolution of July 29, 1890, effected that result. The appellant concedes that such was the purpose of the common council, but nevertheless insists that it was beyond the power of that body to waive performance of any of the requirements of the contract or specifications, and that in holding otherwise error was committed.

282 The result of our examination of the charter of the city of Syracuse leads us to the conclusion that it does not place any limitations upon the powers of the common council in respect to such acts as the common council undertook to perform by means of the resolution in question. Aside from certain limitations that we need not specify, all details are left to the common council, and not made the basis of the consent of the property owners. The modification attempted, therefore, was within the power of the common council under the ruling of this court

in *Meech v. Buffalo*, 29 N. Y. 198; *Moore v. Albany*, 98 N. Y. 396; and *Voght v. Buffalo*, 133 N. Y. 463.

The appellant next contends that the failure to obtain the certificate of the engineer entitled the defendant to a dismissal of the complaint. We think the certificate obtained was in compliance with the contract as modified by the resolution of July 29, 1890. The engineer could not certify that the work was performed in accordance with the original contract and specifications, because such was not the fact, but he did certify in effect that the work done after the twenty-ninth day of July, 1890, was in accordance with the contract and specifications, while the work done prior to that date was in conformity with the resolution adopted by the common council, by which an attempt was made to modify the contract. It was, in effect, therefore, a certificate that the work had been performed in accordance with the original contract as modified by the resolution of July 29, 1890, and was sufficient.

The appellant also insists that the action was prematurely brought, because no part of the contract price has been assessed or collected. The contract provides: "No payment shall be made to the party of the first part under this contract, until the cost of such work shall have been ascertained and assessed upon and collected from the taxpayers liable to local taxation for the same . . . and as soon thereafter as the costs of said work shall have been collected from said taxpayers, the party of the first part shall be entitled to receive the amount due on said final account." This clause ²⁸³ in the contract is not an unusual one, nor is it, or at least an equivalent provision, a stranger to the courts. As long ago as the action of *Hunt v. Utica*, 18 N. Y. 442, the court had under consideration a contract of this character. After its completion, and on the sixteenth day of November, the claim for compensation was allowed by the common council, "payable when collected by assessment." On the 7th of December following, the common council made the necessary assessment, and directed that measures be taken for the collection thereof. On January 26th the assignee of the contractor commenced an action to recover the contract price. At that time no part of the assessment had been paid, but five days later the treasurer issued a warrant for its collection, which was in the hands of the collector at the time of the commencement of the action. It was held that the plaintiff could not recover. The decision of the court in that case has not been questioned in any subsequent case, and the de-

cision of many succeeding cases has been governed by the principle enunciated in that case, viz., that where a way of payment is prescribed by statute or by contract that way must be strictly pursued: *People v. Mayor etc.*, 144 N. Y. 63; *Swift v. Mayor etc.*, 83 N. Y. 528, 533; *Howell v. Buffalo*, 15 N. Y. 512, 519; *Baldwin v. Oswego*, 1 Abb. App. Dec. 62, 68; *Beard v. Brooklyn*, 31 Barb. 142, 149; *Dannat v. Mayor etc.*, 66 N. Y. 585.

Such a provision as to work of this character is usual and reasonable, for, as the municipal authorities have no right to make such improvements at the expense of the taxpayers generally, it follows: 1. That no money is raised by general taxation that is available for the payment of such expenses; and 2. That it is necessary to make the avails of the special assessment meet the obligations of the city under the contract. All this is known to the contractor when he makes his bid and enters into the contract, and presumably he has provided suitable compensation to himself for the loss of the use of the sums due under his contract until a reasonable time shall have ²⁸⁴ elapsed in which to levy the assessment and make collection. If he finds, as in the case of *People v. Mayor etc.*, 144 N. Y. 63, that the city has not proceeded with reasonable diligence to collect the assessment and turn over the proceeds to him, he may and should proceed by mandamus to compel such action on its part. But where a municipality disables itself from performing the contract by such action on its part as makes void and, therefore, uncollectible, an assessment for the purpose of providing compensation, or refuses to perform the contract on its part, as in *Reilly v. Albany*, 112 N. Y. 30, then an action against the city for the damages sustained by reason of its failure to perform the contract on its part may be maintained.

It has been suggested that the two cases last referred to are in conflict, but they are not. The *Ready* case points out that prior to the breach of the contract by the municipality the contractor's remedy is to apply for a mandamus to hasten municipal action in the absence of due diligence; while the *Reilly* case, with equal clearness, marks out the path to be pursued by the contractor, where the other party, to wit, the municipality, either designedly or accidentally puts itself in a position where it will not or cannot perform the contract on its part. In such a case, the remedy is against the city for breach of the contract.

As we must regard the facts as found by the verdict of the jury, this case comes under the rule in *Reilly's* case, for the plaintiffs have fully performed the contract as modified by the

resolution of July 29, 1890, and are entitled to compensation therefor. But the defendant, instead of recognizing the plaintiffs' rights in the premises and proceeding with reasonable diligence to levy the assessment, collect and turn it over to the plaintiffs, has declared, by resolution, that the contractors have not only not performed, but have abandoned the contract, has let to other contractors the rebuilding of a portion of the sewer constructed by these plaintiffs, and has refused to take any steps looking to the making of an assessment upon the property benefited for the purpose of raising the ²⁸⁵ money with which to pay the plaintiffs, as provided by the contract. The plaintiffs' right, therefore, to pursue the defendant for a breach of the contract is established.

We are thus brought to the last, but not the least, of the interesting questions presented by the appellant, which is that the court ought to have permitted the defendant to prove that the passage of the resolution of July 29, 1890, was corruptly procured. The importance of this question in this particular case is readily apparent. It is not pretended that the contract was substantially performed as to the construction of the first fourteen hundred and fifty-three feet of the sewer. The certificate of the engineer, which the contract says must be given in order to entitle the plaintiffs to the compensation provided for by the contract, does not assert that as to the portion of the sewer above referred to the contract was performed. On the contrary, the certificate is to the effect that performance in that respect is in accordance with the contract as modified by the resolution of July 29, 1890. If that resolution be void and of no effect, then the plaintiffs have not established their right to recover in this action, for they have not only failed to prove the making of the necessary certificate by the engineer, but they have failed to prove substantial performance on their part.

The question is also an important one in its public aspects, for, so far as we have observed, it has seldom been brought to the attention of the courts. The counsel for the respondent insists that the question was not before the court in such a manner as required it to pass upon the point involved. Let us inquire of the record whether he is right or not. The answer alleges, among other things, "that the said resolution, purporting to modify said contract, passed by the common council on the twenty-ninth day of July, 1890, as set forth in said complaint, was passed collusively, corruptly, and fraudulently, and is the result of a corrupt bargain, in and by which it was agreed

that a large sum of money should be paid by said contractors for a vote in favor of said resolution, which said money was paid, and that said resolution by reason thereof is null and void and of no effect as a modification of said contract."

²⁸⁶ During the progress of the trial the counsel for the corporation asked several questions which brought to the attention of the court and the counsel for the plaintiffs the defense relied upon by the city, and which we have in part quoted. The court was inclined to the view that the resolution was a legislative act and could not be thus attacked, whereupon the defendant's counsel, for the purpose of raising the question in the briefest form, said: "I desire to show that Mr. Weston (plaintiff) procured a vote of one member of the common council by corrupt means; that a sum of money was paid by the plaintiff and accepted by a member of the common council in consideration of his vote for the adoption of that resolution, and that the vote of such member was obtained and cast by him in consideration of the payment of such sum of money." This offer was denied and the evidence excluded by the court, the defendant excepting. It is not, of course, claimed that if the resolution was in fact procured to be passed by bribery, it would nevertheless constitute a valid and effective modification of the contract. That it would be void as against public policy is too clear to admit of discussion; but the contention rather is that the courts are without power to inquire into the matter. The reason assigned is that the act of the common council in passing this resolution was legislative in character, and hence the motives that induced the members to vote for its passage, whether honest or corrupt, are not the subject of judicial investigation. It is true that the legislative department of the state government is sovereign, and hence the motives that induce its action cannot be the subject of judicial investigation. The constitution also empowers the legislature by general laws to confer upon boards of supervisors of the counties of the state such powers of local legislation and administration as the legislature may, from time to time, deem expedient: Const., art. 3, sec. 27. It has been held that the action of a board of supervisors, in undertaking to establish a fire district in a town under section 37 of the county law, is legislative in character, and therefore not subject to review by certiorari, because the affidavits verifying ²⁸⁷ the petition did not state that the petition complied with the requirements of the statute: *People v. Supervisors*, 153 N. Y. 370.

In *People v. McIntyre*, 154 N. Y. 628, it was held that within the limits of the power delegated to supervisors by the legislature under the authority conferred upon it by the section referred to, each board of supervisors is clothed with the sovereignty of the state to legislate as to all details, precisely the same as the legislature might have done in the premises. While that is so, there are many duties devolved upon boards of supervisors by the legislature which are not legislative in character, but are administrative, and in some instances quasi judicial in nature and not at all impressed with the character of sovereignty. Among other duties they are required to audit and allow claims against the county. If they arbitrarily refuse to audit a claim the court may, by mandamus, require them to take action thereon: *People v. Supervisors of Delaware Co.*, 45 N. Y. 196, 199. So, where the board of supervisors audit and allow to a public officer a sum in excess of that legally due him, the court will, by mandamus, and upon the application of a taxpayer, require the board to reconsider, revoke, and annul the audit as to such excess: *People v. Supervisors*, 73 N. Y. 173.

While the acts of boards of supervisors, or boards of town auditors, in auditing the accounts within their jurisdiction, are, in the absence of fraud and collusion, final and conclusive and not the subject of attack in a collateral proceeding, they may, nevertheless, be attacked in such a proceeding in an action brought by a taxpayer under chapter 161 of the Laws of 1872: *Osterhoudt v. Rigney*, 98 N. Y. 222.

Many cases might be cited where boards of supervisors have been compelled to act by mandamus, where they have failed to perform the duties which the law enjoined upon them, as well as cases where their action, involving legal errors as distinguished from discretionary matters, have been reviewed by certiorari, and also where the audit has been attacked in a collateral action brought under the taxpayers' ²⁸⁸ statute, so called. But it would serve no good purpose, as the cases already cited are sufficient to call attention to the fact that there are many administrative duties of boards of supervisors that are not impressed with the character of sovereignty. So, too, the legislature may confer upon common councils of cities authority to pass municipal ordinances. Such as are passed in pursuance of such authority have the force of law, and are as obligatory as if enacted by the legislature itself: *Buffalo v. New York etc. R. R. Co.*, 152 N. Y. 276. But, like boards of supervisors, a common council has many administrative duties that are not legislative

in character, performance of which, at times, has to be compelled by the courts. Not infrequently, in the case of special assessments for local improvements, such as the case at bar, actions are successfully prosecuted by taxpayers to set aside assessments against property on the ground that the assessments are illegal and void. In *Miller v. Amsterdam*, 149 N. Y. 288, in pursuance of legislative authority, the common council undertook to, and did, pave a certain street, and to defray the expense thereof made an assessment against the property specially benefited, but the statute under which the common council attempted to act provided that the street could be paved only upon a petition therefor of the owners of a majority of the lineal feet fronting on the street. The petition presented, and upon which the common council acted, turned out not to have the requisite number of consents. This court held that the action of the common council was without jurisdiction, and affirmed the judgment setting aside the assessment against the property of the plaintiff, upon the ground that it was void.

If the common council in *Miller's* case, in the institution of proceedings to pave the street, had been acting in a legislative capacity, and was sovereign in that which it did, then, necessarily, it would not have been open for inquiry by the courts whether it had acquired jurisdiction to legislate at all by the petition of the requisite number of lotowners. But it was not sovereign. It had no authority to act at all in the absence of a petition signed by the owners of a majority of the ²⁸⁹ lineal feet fronting on the street, and therefore its proceedings were not in accordance with the directions of the charter; and, in attempting to act as it did, its proceedings were the subject of direct review by certiorari or to attack in a collateral action such as was made. If the action taken by a common council under the statute to pave a street be not sovereign and free from direct review or collateral attack in the courts, no more is the action of a common council, under a similar statute, to build a sewer; and it is yet more absurd to claim that the resolution by which the common council undertook to effect a compromise and settlement with a contractor to whom something was equitably due, though, perhaps, nothing legally, because of his failure to perform the contract in all respects, constituted a legislative act.

Having established by authority, to which very many citations in point in this state might be added, that the resolution in question constituted a part of the administrative duties of the common council, we come next to the question whether

such a resolution, if passed by means of fraud and corruption, can be declared of no effect by the courts. This question is answered in the affirmative by *Talcott v. Buffalo*, 125 N. Y. 280. That was an action by a taxpayer to prevent waste of or injury to the property of the municipality, the claim being that the common council of the city of Buffalo had passed the resolution over the mayor's veto, providing for the substitution of electric lights for gas, and that in pursuance of it the proper officers had entered into a contract with the electric light company, by which it had been agreed to pay an exorbitant price, and it was charged that the acts of the common council and its officers in the matter were illegal. The court held that, inasmuch as the action taken by the common council was clearly within its power and discretion, such an action could not be maintained without any charge or allegation of fraud, collusion, corruption, or bad faith. While upon this proposition there was a dissent, all were agreed that, under the taxpayers' act, so called, the complaint would not have been demurrable had it alleged that the acts complained ²⁹⁰ of were without power, or that they were the result of corruption, fraud, or bad faith amounting to fraud. That action, it is true, was brought under and by virtue of the provision of the statute giving to taxpayers the right by action in a proper case to interfere with the conduct of municipal officers. The title of the act first passed (Laws 1872, c. 161) was, "An act for the protection of taxpayers against the frauds, embezzlements, and wrongful acts of public officers and agents." It has since been amended and supplemented by various enactments, which need not now be referred to. This statute did not take away any right of action that the municipality had; and to avoid any possible opportunity for such a suggestion, the last sentence of the statute provided that it should not be so construed as to take away any right of action from any county, town, or municipal corporation. The history attending the passage of this act, and of chapter 49 of the Laws of 1875, is a matter of common knowledge, and was well stated by Judge Andrews in *People v. New York etc. Ry. Co.*, 84 N. Y. 565, 569, as follows: It "was passed in view of the fact that the city of New York had been grossly defrauded by the acts of municipal officers and others acting in collusion with them, and that large sums had been taken from the municipal treasury in the perpetration of the frauds committed. These sums the city or county, one or both of them, might sue for and recover, but re-

sort to this remedy was embarrassed by the fact that the city and county governments were to a considerable extent under the control of the guilty participants in the fraud."

The effect of the legislation is to enable a taxpayer of the municipality, threatened with injury from its officers, and in certain cases the state, to accomplish by action not more than the proper municipal authorities can at all times accomplish, but such results as the municipal authorities can and should, but because of carelessness or willful purpose will not.

If it be the fact that the passage of this resolution was brought about by bribery of the members of the common council, a taxpayer, under the authority of Talcott's case ²⁹¹ could have maintained a suit against the city to enjoin it from paying to the contractors the amount claimed by them to be due under their contracts, for the reason that the statute confers upon him the authority to thus interfere for the protection of the municipal corporation, and that which he can accomplish by such a suit, the officers of the municipal corporation, whose duty it is to protect the corporate property from waste and injury, may bring about by a defense to an action brought by the contractor. It is urged by the respondent that the defendant is estopped by the conduct of its officers subsequent to the discovery by the common council of the alleged acts of bribery. But the difficulty with this contention is that it does not appear that the officers of the defendant knew of the alleged bribery at the time of the several acts which the plaintiffs rely upon to create an estoppel. It does appear that before the commission of some of the acts the common council caused an investigation of the charge of corruption to be made, but it is not shown that one of the outcomes of the investigation was the disclosure of the alleged acts of bribery that the defendant upon the trial offered to prove, and therefore it cannot be said that the action taken by the common council was with full knowledge of the situation.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except Bartlett, J., dissenting, and Martin and Vann, JJ., not sitting.

MUNICIPAL CORPORATIONS—REVOCATION OF CONTRACT—FRAUD—BRIBERY.—A municipal corporation has a right to revoke a contract into which it has entered, where it acts, upon cause, in good faith, and without any fraud or collusion: Note to *Schenley v. Commonwealth*, 78 Am. Dec. 371; but fraud vitiates all

transactions into which it enters: *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318; and a contract growing out of an illegal act will not be enforced. Hence, a contract procured by the bribery of an officer will not be enforced against a contractor nor against a municipal corporation represented by him: *Honaker v. Board of Education*, 42 W. Va. 170, 57 Am. St. Rep. 847.

MUNICIPAL CORPORATIONS—MANDAMUS.—The duty of a city to provide for the payment of a debt becomes perfect, when the creditor obtains a judgment, and then, if the judgment can be paid in no other way, it must be done by levy and collection of a tax for that purpose, and this duty will be enforced by mandamus: See extended note to *Coy v. City Council*, 85 Am. Dec. 544, discussing the subject.

MUNICIPAL CORPORATIONS—POWER OF COURTS OVER PROCEEDINGS OF.—A subordinate municipal body, although clothed to some extent with legislative and even political powers, is nevertheless, in the exercise of all its powers, just as subject to the authority and control of courts of justice as any other body or person, natural or artificial: *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116.

ESTOPPEL—MUNICIPAL CORPORATIONS.—The doctrine of estoppel has been extended to municipal corporations: *Hutchinson etc. R. R. Co. v. Board of Commrs.*, 48 Kan. 70, 30 Am. St. Rep. 273; but to create an estoppel, in any case, the facts which give rise to it must be such as to make it unjust and inequitable to allow the party estopped to assert what would otherwise be his right, or to make proof of matters tending to establish such right: *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587.

PERKINS v. HEERT.

[153 NEW YORK, 306.]

STATUTES—GENERAL LAW—ILLUSTRATION—WORKMEN'S UNION LABEL ACT.—An "act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workingmen or women," where there is nothing in it limiting its provisions to any particular locality of the state, or to any designated association or union of workingmen or women, is not a local or private law, but a general one, and does not, therefore, contravene a constitutional provision that the legislature shall not pass a private or local bill granting any exclusive privilege or franchise.

STATUTES—ACT HAVING BUT ONE SUBJECT EXPRESSED IN ITS TITLE—ILLUSTRATION.—One subject only is mentioned in the title of an act entitled, "An act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workingmen or women," and that is the better protection of skilled labor by the registration of labels, et cetera, covering the products of such labor.

STATUTES NOT CONTRARY TO PUBLIC POLICY—WORKMEN'S UNION LABEL ACT—CONSTITUTIONALITY.—

An "act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workingmen or women" is not unconstitutional and void, for the reason that it is contrary to public policy, in that it unjustly discriminates in favor of the labor of members of associations or unions as against that of nonunion workmen.

STATUTES—GRANT OF EXCLUSIVE PRIVILEGE UNDER GENERAL LAW.—An exclusive privilege or franchise is authorized, if obtained under general laws, where the state constitution authorizes the legislature to pass general laws, under which such a privilege or franchise may be granted.

STATUTES—GRANT OF EXCLUSIVE PRIVILEGE—STATE POLICY.—If a state constitution authorizes a grant, through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state.

Action brought by the plaintiff, Perkins, against Heert and Ehlen, for an injunction, which was awarded, with damages and costs, and the defendants appealed.

John A. Straley and Morris S. Wise, for the appellants.

Antonio Knauth and Tracy C. Becker, for the respondents.

308 **HAIGHT, J.** This action was brought by the plaintiff, as president of the Cigar Makers' International Union of America, under the provisions of chapter 385 of the Laws of 1889, for an injunction to restrain the defendants from using an alleged imitation of the union's label, a copy of which had been filed in the office of the secretary of state under the provisions of that law, and also for an accounting for profits.

The Cigar Makers' International Union of America is a voluntary unincorporated association, consisting of a large number of persons who are practical cigar makers residing in the United States, with its principal office located at Buffalo. The purpose of their organization is the promoting of the mental, moral, and physical welfare of its members by assisting them to obtain labor at remunerative wages and by affording them pecuniary aid in case of sickness, and generally to maintain a high standard of workmanship. They adopted a label upon blue paper with an ornamental border, containing the following:

300 "Sept., 1880.

"Issued by authority of the Cigar Makers' International Union of America. Union Made Cigars. This certifies that the cigars contained in this box have been made by a first class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior ratshop, coolie, prison, or filthy tenement-house workmanship. Therefore, we recom-

mend these Cigars to all smokers throughout the world. All infringements upon this label will be punished according to law.

"G. W. PERKINS,

"President C. M. I. U. of America."

On one end was a copy of the seal of the union, and on the other end a place was reserved for a local stamp. After the passage of the act in question, they caused a copy of this label to be filed in the office of the secretary of state.

The defendants are cigar manufacturers in the city of New York, and are not members of the union. They caused to be printed counterfeits of the blue label adopted by the union, and pasted it upon boxes containing the cigars manufactured by them, and then, through their agents, sold their cigars to the public with the intent, as has been found, to defraud the union and the purchasers and to impose upon the public.

The case was tried before the court without a jury, and a decision was rendered in favor of the plaintiff, awarding a perpetual injunction against the defendants and for damages and costs.

It is claimed on behalf of the appellants that the label had been abandoned by the union; that it contained matter libelous and defamatory, which a court of equity would not protect, and that the statute in question had been repealed. These questions were fully considered by the learned appellate division, and we fully concur with the views of that court, as expressed in the prevailing opinion, with reference thereto. The only questions which we deem it necessary to here consider are those raised with reference to the constitutionality of the act.

310 The statute is as follows: "Sec. 1. Every union or association of workingmen or women, adopting a label, mark, name, brand, or device, intended to designate the products of the labor of members of such union or association of workingmen or women, shall, in order to obtain the benefits of this act, file duplicate copies of such label, mark, name, brand, or device in the office of the secretary of state, who shall, under his hand and seal, deliver to the party filing or registering the same a certified copy and a certificate of the filing thereof, for which he shall receive a fee of one dollar. Sec. 2. Every union or association of workingmen or women adopting such label, mark, name, brand, or device, and filing the same, as specified in the first section of this act, may proceed, by suit in any of the courts of record of the state, to enjoin the manufacture, use, display, or

sale of counterfeits or colorable imitations of such label," et cetera.

It is claimed that the act in question is void, for the reason that it grants an exclusive privilege to a private association in contravention of the provisions of the constitution: Const., art. 3, sec. 18. That section of the constitution, so far as material, provides as follows: "The legislature shall not pass a private or local bill in any of the following cases, granting to any private corporation, association, or individual any exclusive privilege, or franchise whatever. . . . The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws."

It will be observed that the prohibition contained in this provision of the constitution has reference to private or local bills, and that it requires the legislature to pass general laws providing for the cases in which private and local bills are prohibited. The question, therefore, arises as to whether the act in question is a general law or a private and local bill. It is entitled, "An act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workingmen or women." There is nothing in the ³¹¹ title or the provisions of the act that in any manner limits its provisions to any particular locality of the state or to any designated association or union of workingmen or women. Instead, the provisions are all general, including every locality in the entire state, and embracing every association or union of workingmen or women existing or that may be thereafter organized. It is in no sense local or private, but is in every sense a general law.

Again, it is claimed that the act is within the condemnation of section 16, article 3, of the constitution, which provides that "no private or local bills, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." We have already shown that the act is a general law, and not a private nor local bill. It, consequently, is not brought in conflict with this provision. Furthermore, we think but one subject is mentioned in the title, and that is the better protection of skilled labor by the registration of labels, et cetera, covering the products of such labor.

Finally, it is insisted that the act is unconstitutional and void, for the reason that it is contrary to public policy, in that

it unjustly discriminates in favor of the labor of members of associations or unions as against that of nonunion workmen. The questions arising under this contention are more serious and require deliberate consideration. While private and local bills, granting to a private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever is prohibited, the constitution authorizes the legislature to pass general laws under which grants may be made to corporations, associations, or individuals of an exclusive privilege, immunity, or franchise. An exclusive privilege or franchise is, therefore, authorized if obtained under general laws. Among the exclusive privileges and franchises which have been made the subject of grants to private corporations, and with which we are all familiar, are those made by municipal governments under the authority of general laws of the right to occupy streets or highways for the construction and operation of street railroads. ³¹² In all of these grants there is, of necessity, discrimination. Some particular corporation is singled out, to which the grant is given, and which, thereafter, enjoys the exclusive privilege of operating its railroad through the streets or highways specified in the grant; but the grant being authorized, the discrimination is not unlawful. It is not contrary to public policy, for the reason that the constitution is the foundation upon which the public policy of the state is based. It embodies the policy of our government. It authorizes that which is politic and prohibits that which is deemed impolitic. Where, therefore, the constitution grants or authorizes a grant through legislative action of an exclusive privilege, it must be deemed to be in accord with the policy of the state. As we have seen, the label authorized was by a general and not a local act. No particular association or union has been given the exclusive privilege of adopting a label, but every association or union of every kind of workmen or women is given the right to adopt its own label, which may indicate its own workmanship. It consequently follows that whatever discrimination there may be is authorized, and therefore not unjust, and that the privilege granted under the general law is in accord with public policy.

We are aware that the courts of sister states have had trouble with similar legislation in their states; that very much has been written upon the subject, and that the conclusions reached by the courts in the different states have widely differed. We have not thought it profitable to enter upon an elaborate discussion of these cases. The questions here presented arise under our

own constitution and are confined within narrow limits. We have not overlooked the intimation that the passage of this act was procured for the purpose of enabling union labor organizations to boycott nonunion laborers and to deprive them of the legitimate fruits of their labors. We cannot, however, assume that such was the purpose and intent of the legislature, or that the association of which the plaintiff is president will resort to acts which are unlawful and criminal. The act allows the members of the ³¹³ union to send the products of their labors into the markets of the country marked in such a way as to indicate the character of their workmanship. This is legitimate and proper. It is a right that the law accords to every manufacturer. We must assume, therefore, that the legislature, in passing the act, had in view the lawful and legitimate purpose, and that they did not contemplate that the provisions of the act might be used for illegitimate purposes. These views render it unnecessary to consider the question as to whether the label was a valid trade-mark at common law.

No question is raised as to the right of the plaintiff to prosecute the action as president of the association.

The judgment should be affirmed, with costs.

All concur.

STATUTES—GENERAL AND LOCAL LAWS.—A general law, as distinguished from a special or local law, is a law that embraces a class of subjects, or places, and does not omit any subject, or place, naturally belonging to such class. The test of the generality of a law is that it shall embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class: *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600; note to *State v. Bargas*, 53 Am. St. Rep. 632. The legislature may enact general laws, which, from their nature, will be capable of enforcement in particular portions of the state only; and the fact that an act is applicable to the conditions existing in a single city in the state will not necessarily render it local or special legislation: Note to *Wanser v. Hoos*, 64 Am. St. Rep. 615. A statute which relates to persons or things as a class is a general law, while one that relates to particular things or persons of a class is special: See monographic note to *State v. Ellet*, 21 Am. St. Rep. 781, on what is a general law. A law is unconstitutional and void where it is, in fact, local in its application, though general in form: *State v. Ellet*, 47 Ohio St. 90, 21 Am. St. Rep. 772, and note at 788.

STATUTES—CONSTITUTIONALITY—GRANT OF EXCLUSIVE PRIVILEGE—WORKMEN'S UNION LABEL ACT.—A statute authorizing a union or association of workmen to adopt a trade-mark or label, to be used only on goods prepared by members of that association, does not conflict with the provisions of the state constitution inhibiting the granting to any corporation, association, or individual of any special or exclusive right, privilege, or immu-

ity: *State v. Bishop*, 128 Mo. 373, 49 Am. St. Rep. 569, and note, showing that a statute entitled, "An act to protect associations, unions of workmen, and persons in their labels, trademarks, and forms of advertising," does not violate a constitutional provision prohibiting the passage of local or special laws and the granting of special privileges.

STATUTES—SUFFICIENCY OF TITLE.—The title of an act is sufficient where it declares the general purpose of the statute, and the provisions of the act are germane to the purpose expressed in the title: See monographic note to *Bobel v. People*, 64 Am. St. Rep. 75, on the sufficiency of the title to a statute.

MATTER OF STRYKER.

[158 NEW YORK, 526.]

STATUTES — CONSTRUCTION — ANALOGOUS WORDS.—When two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and to give color and expression to each other.

WAGES—PREFERENCE TO CLAIMS FOR—LIMITATION UPON WORD "EMPLOYEES."—In determining what claims shall be preferred, under a statute which gives a preference to "the wages of the employés, operatives, and laborers" of corporations in the hands of a receiver, the general and comprehensive word "employés" must be limited by the more specific words, "operatives and laborers."

WAGES—PREFERENCE TO CLAIMS FOR—CONSTRUCTION OF STATUTE.—A statute giving a preference to "the wages of the employés, operatives, and laborers" of corporations in the hands of a receiver is intended to limit the preference to the particular class whose claims would be properly expressed by the use of the word "wages."

WAGES—APPLICATION OF TERM—SALARY—FEE.—The word "wages" is applied, in common parlance, specifically to the payment made for manual labor, or other labor of a menial or mechanical kind, as distinguished from salary, and from fee, each of which denotes compensation paid to professional men.

WAGES—PREFERENCE TO CLAIMS FOR—CONSTRUCTION OF STATUTE—SALARY.—The word "wages," in a statute giving a preference to "the wages of the employés, operatives, and laborers" in the hands of a receiver, conveys the idea, in its application to laborers and employés, of subordinate occupation which is not very remunerative. Such a statute is not, therefore, designed to give a preference to the salaries and compensation due to officers and employés of a corporation occupying superior positions of trust or profit.

WAGES—PREFERENCE TO CLAIMS FOR—SALARIED PERSONS WHO CANNOT CLAIM.—Under a statute which gives a preference to "the wages of the employés, operatives, and laborers" of corporations in the hands of a receiver, the claims of those in the employ of an insolvent manufacturing company, such as a clerk and bookkeeper, the superintendent, shop foreman, and a draftsman,

all under salaries ranging from one hundred to two hundred and twenty-five dollars per month, are not entitled to preference as claims for wages.

Petition to have certain claims paid as claims for wages. The nature of these claims appear in the opinion. An order was made directing the receivers of the New York Locomotive Works not to pay these claims as preferred claims, and not to treat them as claims for wages. The applicants appealed.

Charles Carmichael, for the appellants.

Leslie W. Kernan, for the respondents.

527 O'BRIEN, J. The courts below have determined, by the order appealed from, that four different and distinct claims presented to the receivers were not entitled to the preference provided by chapter 376 of the Laws of 1885. One of the claims was presented by a clerk and bookkeeper, who had been employed in the office of the corporation at a salary of one hundred dollars a month, payable at the end of each month. Another by the superintendent of the corporation, who had been employed at a salary of one hundred and twenty-five dollars a month. Another by a draftsman employed in the office of the corporation at a salary of one hundred and twenty-five dollars a month, and the other claim was made by two foremen employed by the corporation, one of the boiler shop at a salary of two hundred and twenty-five dollars a month, and the other in some other department at a salary of one hundred and twenty-five dollars a month.

The question is, whether these claims were entitled to a preference under the provisions of the statute which reads as follows: "Where a receiver of a corporation created or organized **528** under the laws of this state and doing business therein . . . shall be appointed, the wages of the employés, operatives, and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands." It is said that the applicants were employés of the corporation, and doubtless that assertion is correct. But the word "employé" would include every person in the service of the corporation, without regard to his grade or rank, or the nature of his duties. If preference should be given to the claims of these parties on the ground that they were employés of the corporation, we would necessarily have to exclude the other

words, "operatives and laborers." When two or more words of analogous meaning are employed together, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other. Hence, although the word "employé" is general and comprehensive, it must be limited by the more specific words, "operatives and laborers," which are found in the statute: *Wakefield v. Fargo*, 90 N. Y. 218; *People v. Board of Police*, 75 N. Y. 44.

The most important word in the statute is the word "wages." It was wages that the legislature intended to prefer in the distribution of the assets of the insolvent corporation, not salaries, nor earnings, nor compensation. It was not intended to prefer the claims of all employés, but it was manifestly intended to limit the preference to the particular class whose claims would be properly expressed by the use of the word wages. This word is applied in common parlance specifically to the payment made for manual labor, or other labor of menial or mechanical kind, as distinguished from salary and from fee, which denotes compensation paid to professional men: *Century Dictionary*. In its application to laborers and employés it conveys the idea of subordinate occupation which is not very remunerative, of not much independent responsibility, but rather subject to immediate supervision. This was the construction which this court placed upon the statute in ⁵²⁹ the case of *People v. Remington*, 45 Hun, 338; affirmed here on the opinion below, 109 N. Y. 631. It was said in that case that the statute was designed to secure the prompt payment of the wages of persons who, as a class, are dependent upon their earnings for the support of themselves and their families, and it was not designed to give a preference to the salaries and compensation due to officers and employés of a corporation occupying superior positions of trust or profit. I cannot doubt that this is a correct interpretation of the statute which conforms to the purpose which the legislature evidently had in view in its enactment. In order to give the preference provided by the statute, the claim must be for wages in the ordinary sense of that term. It was not, we think, the purpose of the statute to secure a preference for claims due to the clerical force engaged in transacting the business, nor to the superintendent, foremen, or officers of the corporation who are compensated by a fixed yearly salary. Although the word "employés" is used, yet the purpose of the statute was to protect mechanics, operatives, or laborers from loss of their wages in the event of the insolvency of the

corporation. It is significant to note that insurance and moneyed corporations are excepted from the operation of the statute. There was no reason for excepting these corporations but for the fact, well known, that they do not employ labor, in the ordinary sense of that word. The conduct of the business of these corporations requires a large clerical force, graded and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employes, there was no reason why all corporations should not be included within the scope of the statute. But it evidently was not. It was supposed that that class of employes could protect themselves, whereas the common laborer, operative, or mechanic would be left by the failure of the business in a much more helpless condition. The wages of laborers, mechanics, and domestic servants has in modern times become the subject of protective legislation in this and many other countries, and whenever the law has been extended ⁵³⁰ beyond these classes, so as to include the claims of parties performing clerical duties or work of a like character, it was by judicial construction based upon language much broader than is to be found in the enactment in question. As was observed in the case of *People v. Remington*, 109 N. Y. 631, 45 Hun, 338, legislation of this character confers upon a class of persons, having a specific contractual relation with corporations, new and unusual privileges and securities at the expense of other creditors whose distributive share of the assets is diminished. It is in derogation of the common law, and should not be extended to cases not within the reason as well as within the words of the statute. In the distribution of the assets of an insolvent corporation by courts of equity, the maxim that equality is equity is a fundamental rule, and it is only by force of legislation that this principle can be departed from, and then only in favor of the class of creditors that come within the scope of the statute when fairly and reasonably interpreted. In a very recent case we were required to pass upon the claim of an attorney at law which it was contended was entitled to preference under the terms of the statute. In a general sense, it might well be said that he was an employe since he was retained or employed in the business of the corporation, but it was held that he was not a laborer or servant within the scope or policy of the statute: *Bristor v. Smith*, 158 N. Y. 157. While the claim in that case was not based upon the statute in question, but upon another of a kindred nature, the reasoning applies to the claims in question.

We adhere to the doctrine there announced in the opinion of Judge Gray as a correct interpretation of the statute.

These views are not in conflict with the case of *Palmer v. Van Santvoord*, 153 N. Y. 612. The claimant in that case was not a superintendent, or foreman, or bookkeeper, or clerk. The courts below had held that he was a laborer or operative within the meaning of the statute, and this court affirmed the decision. It will be seen by a careful reading of the facts that the duties performed by the person who presented the claim in that case were those of a mechanic or laborer, and ⁵³¹ while it appears that he sometimes solicited and made sales of the machines manufactured by the company, yet that was merely incidental to his other duties. He was employed to go from place to place and set up mowing machines for farmers to whom they had been sold. He was required to unpack the machines and repack them, and ship to the company when necessary. He was required to put the machines together and fit them for operation. All this was mechanical and manual labor, and hence his claim was within the scope of the statute. His claim differed from those of the other laborers and mechanics in the employ of the company only in the circumstance that his compensation was measured by the month instead of the day, and the fact that he sometimes acted as a salesman was regarded as a mere incident of the principal employment, and hence not affecting his right to the preference secured by the statute.

We think that the case was correctly decided below, and that the order should be affirmed, but since the question seems to have been presented in the first instance at least by the petition of the receivers themselves, no costs are awarded either party.

GRAY, J. The reasoning in *Palmer v. Van Santvoord*, 153 N. Y. 612, in my opinion, embarrasses, not a little, the decision of this case, inasmuch as Chief Judge Andrews attributed a larger import to the word "employé" than to the words "operatives and laborers," which follow it, and he thought that it should not be confined to those persons who performed manual labor only. He, also, held that this act proceeded upon a broader legislative policy, as to the persons to be protected, than did the act of 1848, which imposed a certain liability upon stockholders of corporations for debts due to employés. I think that his opinion conflicts somewhat with the case of *People v. Remington*, 109 N. Y. 631, affirming 45 Hun, 338,

on the opinion there, and, if the opinion is followed, it might compel a reversal of the judgment. I did not take part in the decision of the case of ⁵³² *Palmer v. Santvoord*, 153 N. Y. 612, which, on its facts, I regard as having been correct, and I shall concur with Judge O'Brien in his conclusion, for the affirmance of this judgment, because the construction of this statute as therein given accords with my views.

I have some doubt as to the cases of the foremen in the machine shops, who are shown to have performed the manual labor of mechanics, although holding positions as foremen and being paid by the month. But I am willing to waive the doubt in favor of a more restricted construction of a statute, which creates an exception in the equal distribution of the assets of an insolvent corporation.

All concur (Gray, J., in memorandum, and Bartlett, J., in result) except Haight, J., who concurs except as to the book-keeper and draftsman, as to whom he favors a reversal on the authority of *Palmer v. Van Santvoord*, 153 N. Y. 612.

WAGES—PREFERENCE IN FAVOR OF EMPLOYEES—LABORERS.—The term "employés" embraces laborers and servants, and those occupying inferior positions: *Johnston v. Barrills*, 27 Or. 251, 50 Am. St. Rep. 717, and note, showing that "laborers" are those who earn a livelihood by their own manual labor. See monographic note to *Oliver v. Macon Hardware Co.*, 58 Am. St. Rep. 303, on who are laborers. Under a statute making debts for labor preferred claims against the estate of an insolvent, a debt due from an insolvent newspaper corporation to a mailing clerk, for mechanical and manual work, is a debt due for labor. A claim for labor, at least within the meaning of exemption and lien laws, has reference to manual labor, and clerks, agents, and like employés, whose employment is associated with mental labor and skill, are not deemed laborers: *Michigan Trust Co. v. Grand Rapids Democrat*, 113 Mich. 615, 67 Am. St. Rep. 486, and note. As to what wages are not subject to garnishment or execution, see note to *Abrahams v. Anderson*, 12 Am. St. Rep. 276.

PEOPLE v. FIELDING.

[158 NEW YORK, 512.]

TRIAL—CRIMINAL CASES—ARGUMENT—PROSECUTING ATTORNEY—DUTY OF.—The prosecuting attorney, in a criminal case, represents the majesty of the people, and, having no responsibility, except fairly to discharge his duty, should put himself under proper restraint, and should not, in his remarks before the jury, go beyond the evidence or the bounds of a reasonable moderation. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest.

APPEAL—CRIMINAL CASES—IMPROPER APPEAL TO JURY—REVERSAL OF CONVICTION.—If a conviction in a criminal case follows an improper and dangerous appeal to the prejudice of the jurors, made by the prosecuting attorney, and it is reasonably certain that his course brought about such result, the judgment will be reversed for such error whenever it is raised by a proper exception.

EVIDENCE—REASONABLE CERTAINTY—STRONG PROBABILITIES.—A proposition is reasonably certain when it is supported by the strong probabilities.

TRIAL—IMPROPER APPEAL TO JURY—CURING OF ERROR.—INSTRUCTIONS to the jury do not always neutralize, either as a matter of law or fact, the effect of improper remarks in their presence.

APPEAL—CRIMINAL CASES—IMPROPER APPEAL TO JURY—ILLUSTRATION—REVERSAL OF CONVICTION.—When a city officer is being prosecuted for conniving at the allowance of a fraudulent claim against the city, and the prosecuting attorney, in summing up, makes harsh and unjust statements to the jury, not founded upon evidence, but resting wholly on his unsupported declarations; draws vivid pictures of suffering and want, of wrongs done to widows and their broods of little children, with "pinched and haggard" faces, by the defendant, and of a multitude of people waiting outside the courthouse for his conviction; depicts the hardships of small taxpayers; urges the privations of the poor and the overwhelming influence of public opinion against the defendant; describes him as a thief, living in a palace on the proceeds of public plunder; and even attempts to intimidate the jury by telling them that they will commit "the unpardonable sin" unless they convict him, there is, in case of conviction, presented a situation in which there should be a reversal, particularly where the record shows that such statements were persisted in after repeated objections, under the claim, sustained by the trial court, that it was right to make them.

TRIAL—CRIMINAL CASES—OBJECTION TO GENERAL COURSE PURSUED BY PROSECUTING ATTORNEY.—If a prosecuting attorney, in a criminal case, persists, after repeated objections, in making improper statements during his address to the jury, and such objections go to the general course pursued by him, no further objection or exception is necessary after the court sanctions such course, pronouncing it "perfectly proper."

TRIAL—CRIMINAL CASES—IMPROPER APPEAL TO JURY—CORRECTION OF ERROR.—When a prosecuting attorney, in a criminal case makes improper statements in his address to

the jury, and the court seeks to correct them, the correction should be as broad as the error, and cover substantially the same ground. It should be clear and specific enough to repel the presumption of injury. Otherwise, the error is not cured.

The defendant was convicted of the crime of consenting to, and conniving at, the auditing or allowance of a false or fraudulent bill or claim against the city of Brooklyn, in violation of section 165 of the Penal Code, he being at the time deputy commissioner of city works of that city.

Charles J. Patterson, for the appellant.

Hiram R. Steele, for the respondent.

543 VANN, J. We think that the record before us is free from reversible error, except as to a single question which is raised by the following extract from the appeal book, transcribed literally so that it may speak for itself.

The district attorney, in summing up, said: "Defendant changed his style of living from a frame house on Prospect avenue to a palatial residence on Eighth avenue, which every man knows cannot be maintained in the style of that neighborhood for less than ten thousand dollars a year." Objected to. The court: "There is no evidence of that." By the district attorney: "I appeal to the common sense of the jury." The court: "There is no other comment required than the **544** statement of the fact that there is no evidence in the case as to how much it cost to maintain an establishment on Eighth avenue." By the district attorney: "There is no evidence, but you will not prohibit their using their experience, et cetera." In further summing up, he said: "Go and spend an hour in the tax collector's office the day after the tax levy is confirmed, and look at the long line—" Objected to by the defendant. The court: "I do not think this interruption is called for." By defendant's counsel: "I will take an exception if your honor will permit him to proceed on that line." The court: "I will hear what he says first." By defendant's counsel: "I ask to have it taken down. I ask you to stop him at this point, and take an exception." The court: "I cannot do both; I cannot have it taken down and have him stopped also. Proceed." By the district attorney: "I say, visit the tax office on the day after the annual taxes are confirmed, and look at the long line, that stretches out into and down the street, of people that are willing to stand there all day in order to save the little rebate which early payment secures. Those people are the victims of

the defendant's fraud." By defendant's counsel: "Does your honor permit him to proceed in this fashion?" The court: "Yes." By defendant's counsel: "I will take an exception." By the district attorney: "This interruption is outrageous. Counsel should be instructed to take his exception when I have finished." By defendant's counsel: "Have I right to take it—" The court: "I do not think it is called for; that is all I can say. I can only say that I do not think these continual interruptions are called for." By defendant's counsel: "I have a right to take an exception." The court: "Yes, you have." By the district attorney: "But at a later time." By defendant's counsel: "I think not." By the district attorney: "The purpose is to break the effect of anything I may say to you. He knows it is improper." By defendant's attorney: "I do not." By the district attorney: "I say the people that you will find there in a line on that day are the victims of the defendant's crime. You will find there the widow, that has ⁵⁴⁵ starved her brood of little children and seen their faces get pinched and haggard, in order that she might be sure that tax day should not find her with empty hands. It is that woman's money, coined out of her blood and the blood of her children, that the defendant has stolen and squandered. If you will indulge the pitiful sentiments of your hearts, think of her. Oh, there are unwritten tragedies of that sort enacted, not in the luxurious habitations of Eighth avenue, but behind the shabby front doors of poor neighborhoods. Look at the old man, standing in line, clutching in his knotted fingers his last year's receipt—" By the defendant's counsel: "Does your honor permit this? Is this in your ruling?" The court: "I am going to permit him to sum up his case." By defendant's counsel: "I ask you to stop him at this point about the descriptions of the old man with the knotted fingers." The court: "Proceed." By defendant's counsel: "I will take an exception." By the district attorney: "You ought to be ashamed." By defendant's counsel: "You ought to be ashamed of yourself to talk to a jury like this." The court: "I think it is perfectly proper, but there is nothing I can do to compel the attorney of the defendant to take the ruling of the court." By defendant's counsel: "Let him go on. I shall not interrupt him with another word. Let him describe all the knotted fingers in the land." By the district attorney: "And the claque that stands behind the rail—" The court: "Proceed." By the district attorney: "I say you will see old men in that line

clutching in their knotted fingers rolls of dirty one-dollar bills. Look at their worn and shabby garments; look at the marks of painful labor written all over their aged and clumsy limbs; it is the money of these people which the defendant has stolen and squandered. These are the people whose cause I plead. These are the victims of the defendant's crime. These are the people who now, by tens of thousands, are waiting outside for your verdict. Will you do them justice, or will you not? If you shall let this man, loaded with his guilty plunder, escape, then I say you have committed the unpardonable sin."

546 It did not appear that the defendant's counsel, by his method of summing up, incited these remarks on the part of the district attorney.

In charging the jury the court said: "Some things have been said about the newspapers, about a popular clamor, and about the burden of the taxpayers. Those are considerations which are not to control or influence you in deciding this case. What the clamor may be, I do not know; I have never heard of it. What the newspapers may have said, I do not care; I have never read it. How much the people may or may not be burdened, no matter. If the times were prosperous, a public official has no right to make an assault upon the public treasury or to aid others in doing so, and he must be tried only for the crime he has committed, if he has committed one, and it would be wrong in the extreme to assume anything and allow it to weigh against this defendant because of hard times, or because of difficulties which the people who pay money into the city treasury may or may not have in acquiring the means of making the payment." Upon the request of the defendant he further charged: "That there is no evidence in the case which would justify the jury in finding that it was more expensive to live upon Eighth avenue than in Prospect avenue," and "they are not to consider any facts but those which have been proven by the witnesses or the exhibits."

We do not wish to express any views which would restrict counsel in fair argument, comment, or appeal. We object, however, to the assertion by the learned district attorney of facts not proved, to his inflammatory appeals to passion and prejudice, and to his threat to the jury of popular denunciation, all under the sanction of the trial court. If the record in this case is sustained by the deliberate judgment of the court of last resort, it is difficult to see the limit to intemperate language, un-

proved assertion, or pernicious appeals on the part of counsel for the prosecution, except their own sense of propriety. The law, in our judgment, does not thus leave an accused person, presumed to be innocent until proved to be guilty, bound and helpless in the hands of his accuser.

⁵⁴⁷ Even in a civil action, when counsel are permitted, under objection and exception, while summing up, to read to the jury an abstract from a pamphlet or newspaper, or to exhibit a cartoon, not in evidence, it is good ground for reversal: *Koelges v. Guardian Life Ins. Co.*, 57 N. Y. 638; *Williams v. Brooklyn Elevated R. R. Co.*, 126 N. Y. 96; *McKeever v. Weyer*, 11 Week. Dig. 258. So statements made by counsel, outside of the evidence and subject to objection, which strongly tend to arouse sympathy, prejudice, or resentment in the minds of the jury, require a new trial, even if the court charges that they have nothing to do with the case, and must be disregarded: *Halpern v. Nassau etc. R. R. Co.*, 16 App. Div. 90; *Bagully v. Morning Journal Assn.*, 38 App. Div. 522.

Language which might be permitted to counsel in summing up a civil action cannot, with propriety, be used by a public prosecutor, who is a quasi judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy, or resentment. By such a course, in the long run, he throws away much of his strength because his violent and reprehensible language betrays his bias and finally weakens his influence with the jury. As was said by Judge Earl in *People v. Greenwall*, 115 N. Y. 520, 526, "the district attorney, representing the majesty of the people, and having no responsibility, except fairly to discharge his duty, should put himself under proper restraint, and should not, in his remarks, in the hearing of the jury, go beyond the evidence or the bounds of a reasonable moderation." Neither in that case nor in *People v. Brooks*, 131 N. Y. 321, 329, was any objection made or exception taken. In the former, which was a capital case, the court was not bound to interfere, while in the latter, ⁵⁴⁸ which was an appeal from the general term, it had no power to interfere without an ex-

ception. As the admonition of the court has not proved sufficient to prevent improper and dangerous appeals to the prejudice of jurors, it has become necessary, as we think, to rigidly enforce the general rule of this and many other states that requires a reversal whenever the error is raised by a proper exception.

Abuse of the defendant by the prosecuting officer in his address to the jury, which was calculated to arouse their passions against him and materially prejudice him in the trial, has been held such error as would, of itself, cause a reversal: *Stone v. State*, 22^d Tex. Ct. App. 185. Where the prosecuting attorney was permitted to comment on the personal appearance of the defendant, not as a witness, nor on account of his manner and bearing as such, but as indicating a probability of guilt, it was deemed sufficient to reverse a judgment of conviction: *Bessette v. State*, 101 Ind. 85.

In *Tucker v. Henniker*, 41 N. H. 317, 323, the court said: "It would seem utterly vain and quite useless to caution jurors, in the progress of a trial, against listening to conversations out of the courtroom in regard to the merits of a cause, if they are to be permitted to listen in the jury box to statements of facts calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous, and interested counsel. . . . Statements of facts not proved and comments thereon are outside of a cause; they stand legally irrelevant to the matter in question, and are, therefore, not pertinent. If not pertinent, they are not within the privilege of counsel."

In *Laubach v. State*, 12 Tex. Ct. App. 583, the prosecuting attorney, when commenting upon the evidence in his closing argument, was interrupted by the defendant in person with the statement that if he had certain absent witnesses he could show a different state of facts. Thereupon the attorney, addressing the jury, stated that a brother of the absent witnesses told him that they, if present, would testify against the defendant. Objection was promptly made to this remark, and ⁵⁴⁹ the district attorney at once told the jury not to regard anything he or defendant had said. The judgment was reversed upon the ground, among others, that the remark was unwarranted by the law or the facts and was calculated to injure the rights of the defendant by prejudicing his case in the minds of the jury.

In *Brown v. Swineford*, 44 Wis. 282, 292, 28 Am. Rep. 582, counsel, in summing up, commented upon the appellant's connec-

tion with a railroad company and his ability on that account to pay any judgment which might be rendered against him. The court reversed the judgment and after referring to the adjudged cases remarked, "All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not."

In *State v. Smith*, 75 N. C. 306, the prosecuting attorney, addressing the jury, said: "The defendant was such a scoundrel that he was compelled to move his trial from Jones county to a county where he was not known." The conviction was reversed and the court said that "the purpose and natural effect of such language was to create a prejudice against the defendant not arising out of any legal evidence before them, for the jury were precluded from inquiry into the causes or motives for moving the trial and even from the knowledge whether the trial was moved by the state or the defendant."

In *Rea v. Harrington*, 58 Vt. 181, 190, 56 Am. Rep. 561, the court said: "It has been repeatedly held in other jurisdictions, and recently in this, that when counsel persistently travel out of the record, basing arguments on facts not appearing and appealing to prejudice, irrelevant to the case and outside of the proof, it not only merits the severe censure of the court, but is valid ground for exception."

In *Newton v. State*, 21 Fla. 53, it was held that where counsel for the prosecution, upon the trial of a cause before a jury, abusing his privilege to the manifest prejudice of the ⁵⁵⁰ defendant, makes statements with regard to evidence being adduced not pertinent and, therefore, not within his privilege, it becomes the duty of the judge to stop him at once, and if he fails to do so and the impropriety is great it is ground for a new trial upon appeal.

In *Moore v. State*, 21 Tex. Ct. App. 666, the district attorney, in his address to the jury, said that the defendant had been convicted of the offense for which he was on trial "upon a former and previous indictment," and upon appeal it was reversed on a trifling technicality in drawing the indictment, and he urged the jury to give him such a term in the penitentiary as would make up for the great expense he had caused upon a mere technicality. The court, in reversing the judgment, said: "In many decisions this court has urged upon counsel, whose duty

it is to prosecute the pleas of the state, to refrain from injecting into trials of cases of this kind any matter calculated to inflame the minds or excite the prejudice of the jury. If we could add anything to what has been said, or could use any language calculated to reach the minds and consciences of those to whom such admonitions are addressed, we would avail ourselves of the present occasion to do so. As we cannot, we can only reverse and remand the case, in the hope that the accused may secure a fair and impartial trial, according to law and according to those methods alike ancient and honorable which still obtain in all enlightened courts." See, also, as to the effect of a departure from legitimate course of argument, the following cases: *Rudolph v. Landwerlen*, 92 Ind. 34; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Hall v. Wolff*, 61 Iowa, 559; *Bremmer v. Green Bay etc. R. R. Co.*, 61 Wis. 114.

In a case that is free from doubt upon the merits, the appellate courts disregard errors of the trial court, even in a criminal case, when it is reasonably certain that they could not have affected the result. A proposition is reasonably certain when it is supported by the strong probabilities, but here the strong probabilities are that the errors did affect the result. The ⁵⁵¹ average man cannot read the eloquent but inflammatory language of the district attorney without being impressed by it, and it is safe to presume that the effect would be heightened by hearing those words spoken with animation and enthusiasm under the exciting circumstances surrounding an important criminal trial. The jury might be told by the court to forget them, but could they forget them? They might be told to disregard them, but how can we be certain that they did disregard them? Moreover, some of the most objectionable language was not alluded to by the court in its charge, and instructions to the jury do not always neutralize, either as a matter of law or fact, the effect of improper remarks in their presence: *People v. Corey*, 157 N. Y. 332, 346; *Brooks v. Rochester Ry. Co.*, 156 N. Y. 244, 252; *People v. Hill*, 37 App. Div. 327; *Swan v. Keough*, 35 App. Div. 80.

From our observation of jurymen we think the language under consideration would be apt to turn their minds against the defendant, divert their attention from the evidence, and prevent the exercise of sound and dispassionate judgment upon the merits. It brought before them vivid pictures of suffering and want, of wrongs done to the widow and orphan by the defendant, and of a multitude of people waiting outside the court-

house for his conviction. The hardships of small taxpayers, the privations of the poor, and the overwhelming influence of public opinion were urged against him, and he was described as a thief, living in a palace on the proceeds of public plunder. There was even an attempt to intimidate the jury by telling them that they would commit "the unpardonable sin" unless they convicted him. The cause of complaint by the appellant is not a single, inadvertent remark, which might well be overlooked, but, after repeated objections, improper statements were persisted in under the claim, sustained by the court, that it was right to make them.

The harsh and unjust statements of the district attorney were not founded upon evidence, but rested wholly on his unsupported declarations. The most of them would have been ruled out as immaterial or incompetent if evidence had ⁵⁵² been offered to show that they were true. They violated the reason upon which the law of evidence is founded by spreading facts before the jury without any proof, and virtually, also, the rule of evidence which prohibits immaterial and incompetent facts from being proved. There was no evidence that it cost ten thousand dollars a year to live in the style of Eighth avenue, where the defendant resided, and when the point was raised the court so ruled. The district attorney, however, in disregard of the ruling, appealed to the common sense of the jury, and the court very properly tried to check him, but he was allowed to appeal to their experience without rebuke. After that he met with no attempt at restraint by the court. Whatever he said, whether it was about the widow starving her little children until their faces got pinched and haggard in order that she might pay the taxes stolen by the defendant, or about aged men, deformed by painful labor, whose money the defendant had squandered, met with the approval of the court. Instead of repressing these unfounded and dangerous assertions, when repeatedly requested to, at first he condemned the efforts of the defendant's counsel to prevent them, and finally pronounced the course of the district attorney "perfectly proper," and expressed regret that his ruling to that effect was not acquiesced in. Even the threat of popular denunciation and the attempt to frighten the jury by declaring that they would commit the unpardonable sin if they found for the defendant met with neither remonstrance nor reproof. The language of the prosecuting officer, thus indorsed by the highest authority known to the jury, must have gone home to their minds with powerful and con-

vincing effect, while the counsel for the defendant was left in the attitude of a wrongdoer, trying to disturb the proceedings of the court. After persisting in his efforts to protect his client until the court held that he was out of order, he was not obliged to run the risk of punishment for contempt by continuing to object, for all that was said by the district attorney after the court had taken this position should be held subject to the exceptions already interposed. The court should even allow an exception ⁵⁵³ upon appeal where counsel were prevented from excepting at the trial. Moreover, the objections taken were to the general course pursued by the district attorney, and when the court had sanctioned this, no further objection or exception was necessary. This method of summing up should have been sternly interrupted by the court of its own motion, so as to exclude improper statements and comments from the consideration of the jury, for objections made after the district attorney had said what he wanted to were objections made after the harm was done.

After what took place during the summing up, how can we be sure that the general and placid language of the charge wholly counteracted the pointed and vigorous words of the district attorney, indorsed as they had been by the court itself? When improper evidence has been received or improper statements made in the presence of the jury, if the court seeks to correct them, the correction should be as broad as the error, and cover substantially the same ground, as was the case in *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, decided at the present term. The court in its charge said nothing about the improper appeals to sympathy, prejudice, or passion, the starvation of children by their widowed mothers, the knotted fingers and bent forms of old men, the denunciation of the defendant as a thief, or the bugbear of the unpardonable sin held up before the jury so forcibly. The correction did not cure the errors, because it did not go far enough and was not sufficiently clear and specific. It did not repel the presumption of injury: *Coleman v. People*, 58 N. Y. 555, 561; *People v. Fernandez*, 35 N. Y. 49, 59.

Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law because he has not had the fair and impartial trial which the law prescribes for a person charged with crime. If we disregard a sound and well established rule in his case because we think he is guilty, we tear down one of the safeguards provided by society for the protection of its citizens, and the ⁵⁵⁴ precedent.

may, at some time, aid in depriving an innocent man of his liberty or his life.

The judgment should be reversed and a new trial ordered.

HAIGHT, J., Dissented, upon the one question only which he thought it his duty to consider, namely, that pertaining to the remarks of the district attorney who tried the case, and which are quoted in the prevailing opinion. He referred to the monographic notes to *Martin v. State*, 56 Am. Rep. 814, and to *McConnell v. State*, 58 Am. Rep. 648, as ones in which many cases concerning the privilege of counsel, and improper comments by them in addressing a jury, are collected. But he specifically referred to, and quoted from, *Williams v. Brooklyn Elevated R. R. Co.*, 126 N. Y. 96, 102, as expressing his views upon the subject. "In that case, Andrews, J., in delivering the opinion of the court, says: 'It is the privilege of counsel, in addressing a jury, to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve, and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense. The right of counsel to address the jury upon the facts is of public as well as private consequence, for its exercise has always proved one of the most effective aids in the ascertainment of truth by juries in courts of justice, and this concerns the very highest interest of the state. The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation, or appeal, in advocating his cause. This privilege is not beyond regulation by the court. It is subject to be controlled by the trial judge in the exercise of a sound discretion, to prevent undue prolixity, waste of time, or unseemly criticism. The privilege of counsel, however, does not justify the introduction in his summing up of matters wholly immaterial and irrelevant to the matter to be decided, and which the jury have no right to consider in arriving at their verdict. The jury are sworn to render their verdict upon the evidence. The law sedulously guards against the introduction of irrelevant or incompetent evidence, by which the rights of a party may be prejudiced. The purpose of these salutary rules might be defeated if jurors were allowed to consider facts not in evidence, and the privilege of counsel can never operate as a license to state to a jury facts not in evidence, or to present considerations which have no legitimate bearing upon the case and which the jury would have no right to consider. Where counsel, in summing up, proceeds to dilate upon facts not in evidence, or to press upon the jury considerations which the jury would have no right to regard, it is, we conceive, the plain duty of the court, upon objection made, to interpose, and a refusal of the court to interpose, where otherwise the right of the party would be prejudiced, would be legal error.'

"The district attorney," the learned Justice Haight continued, "is a high public officer, representing the state, which seeks equal and impartial justice, and it is as much his duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence, he is, as we have seen in the case alluded to, given the widest latitude within the four corners of the evidence by way of comment, denunciation, or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider. Verdicts obtained through duress, bias, or prejudice, are illegal, and will be set aside. This is also true with reference to verdicts based upon popular clamor."

The comments of the prosecuting attorney were then referred to, and the dissenting justice thought that they went too far and could not be approved. "He departed from his line of duty, which was a discussion of the evidence and a demand of a conviction based thereon, and appealed to the jury for a conviction upon considerations which had no legitimate bearing upon the case, and which the jury had no right to consider." He was inclined to the view, however, that a new trial was not required. "Under the constitution," he said, "we are limited in our review to questions of law. The defendant's counsel took a number of exceptions to the statements made by the district attorney, but when he came to his last and final statement, in which the real vice occurred, the defendant's counsel neglected to take an exception. That which preceded the final remarks of the district attorney may not have been in good taste, but we do not regard it, standing alone, to be such a departure from the line of discussion permissible within the privilege of the district attorney as to warrant a reversal." He regarded the question as very much relieved by the charge of the court, given in the opinion, and which he quoted. "Under section 542 of the Code of Criminal Procedure," he said, "we are required to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. Under the circumstances, therefore, we think the judgment and conviction should be affirmed."

TRIAL—APPEAL—IMPROPER REMARKS OF COUNSEL—CRIMINAL LAW.—Prosecuting officers should avoid remarks or arguments which are calculated to improperly influence juries to go outside the evidence and instructions: *State v. Warford*, 106 Mo. 55, 27 Am. St. Rep. 322, and note, showing that inflammatory and improper language by the prosecuting officer during the trial of a criminal offense will cause a conviction to be set aside. Language used by counsel which evinces a studied purpose to arouse the prejudice of the jury, based upon facts not in the case, is ground for reversal of the verdict and judgment: *Cluett v. Rosenthal*, 100 Mich. 193, 43 Am. St. Rep. 446. Comments of counsel in arguing a

case before a jury are controllable in the discretion of the trial court. This discretion is subject to review, and when counsel makes material statements, outside the evidence, likely to do the accused an injury, it is deemed an abuse of discretion when not stopped by the court on objection made at the time: *Notes to Kearny v. State*, 65 Am. St. Rep. 349; *Cluett v. Rosenthal*, 43 Am. St. Rep. 452. But, to be reviewable on appeal, though such comments are excepted to when made, the court must have been requested to take some action, and have erred in granting or refusing the request: *Note to Kearney v. State*, 65 Am. St. Rep. 349; *Illinois Cent. R. R. Co. v. Beebe*, 174 Ill. 13, 66 Am. St. Rep. 253; *note to Murray v. Dowd*, 59 Am. St. Rep. 301. In order to save any question in relation to the misconduct of counsel during the progress of the trial, the court must be called upon to correct the injury done; if the court refuses to do so, the injured party may then except, and thus save the question involved for the consideration of the appellate court: *Chicago etc. R. R. Co. v. Champion*, 9 Ind. App. 510, 53 Am. St. Rep. 357. As to improper remarks of counsel, generally, compare *Olfermann v. Union Depot R. R. Co.*, 125 Mo. 408, 46 Am. St. Rep. 483; *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521, 39 Am. St. Rep. 187; *Cheatham v. State*, 67 Miss. 335, 19 Am. St. Rep. 310. As to when the misconduct of counsel in argument is so seriously improper as to call for a reversal of judgment, see the monographic note to *McDonald v. People*, 9 Am. St. Rep. 559-570, devoted to that subject.

WITHEROW v. SLAYBACK.

[158 NEW YORK, 649.]

APPEAL—DISMISSAL OF COMPLAINT—RIGHTS OF PLAINTIFF.—If the question as to whether a corporation is answerable upon a promissory note, payable to the plaintiff's order, otherwise than as an indorser, is raised by the pleadings and proofs in a suit upon the note, and the complaint is dismissed at the close of the plaintiff's case, and an exception taken, the question as to whether the plaintiff, upon his proofs, was entitled to go to the jury, is open for review on appeal, although it was not urged on the motion to dismiss.

CORPORATIONS—STATUTORY ACTION TO RECOVER DEBT OF DIRECTORS WHERE COMPANY FAILS TO FILE AN ANNUAL REPORT.—In a suit wherein it is sought to charge the defendants, as directors of a corporation, by virtue of the provisions of a statute, which provides that, in case of failure to file an annual report, "all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made," the plaintiff must, in order to succeed, prove either that, at the time of default in filing the annual report, the debt in suit existed, or that it was contracted before the report was filed.

EVIDENCE—CONTRACT OF INDORSEMENT—INTENTION.—PAROL EVIDENCE is admissible, as between the immediate parties to a contract of indorsement, to ascertain their intention; all the facts and circumstances which took place at the time of the transaction may thus be shown.

EVIDENCE—NOTE INDORSED BY CORPORATION—HISTORY OF INDEBTEDNESS—PAROL.—If the plaintiff, in a suit on

a promissory note, of which he is the payee, seeks to charge the directors of a corporation upon a contract of indorsement made by the corporation when the note was executed, parol evidence of the history of the indebtedness, which resulted in the note, should be received and submitted to the jury.

EVIDENCE—NOTE INDORSED BY CORPORATION—PAROL PROOF THAT COMPANY IS PRINCIPAL DEBTOR. The plaintiff, in a suit on a promissory note, of which he is the payee, and which is indorsed by a corporation, through its treasurer, has a right to show, if he can, by parol evidence, to the satisfaction of a jury, that the corporation is really his principal debtor in the transaction.

CORPORATIONS—FAILURE TO FILE ANNUAL REPORT—DIRECTOR'S LIABILITY—INDORSEMENT OF NOTE BY CORPORATION AND PAROL PROOF OF COMPANY'S LIABILITY. If the superintendent and an officer of an incorporated company signs a promissory note given in payment of a preceding indebtedness due by the company, which, by its treasurer, indorses the note, and the payee seeks to charge the directors of the corporation with the debt for having failed to file an annual report, under a statute which makes them answerable for all debts existing or contracted before the annual report is made, and the directors seek to avoid liability by standing on a strict contract of indorsement, and insisting that they are only contingently answerable when the note is due and the indorser charged, and that protest was after the time of the filing of the report, the plaintiff should be permitted to show, by parol evidence, the real transaction—that the corporation was, in reality, the principal debtor, and that the company was, therefore, answerable to the plaintiff before the default in filing the report was cured.

CORPORATIONS—FAILURE TO FILE ANNUAL REPORT—ACTION FOR DEBT—ABANDONMENT OF BUSINESS AS A DEFENSE.—If a statute makes the directors of a corporation answerable for its existing debts, and those contracted before the company makes an annual report, it is no defense to an action brought to charge them with corporate debts by virtue of the company's failure to file a report that the company had ceased to exist, by abandoning its business and turning over its property to its creditors, before the time for filing the report, if it is shown that such transfer did not embrace all of its property, and that the company continued to exercise acts of absolute ownership over other omitted property, and subsequently filed a report of full payment of its capital stock, as well as two annual reports.

Appeal from a judgment affirming a judgment dismissing the complaint at the close of the plaintiff's case. The action was brought by Witherow against Slayback and others.

Edward C. Perkins, for the appellant.

Henry Bacon and Charles Strauss, for the respondents.

652 BARTLETT, J. This action is brought against three of the directors of the Port Henry Steel & Iron Company, Limited, to charge them with a debt of the corporation for having failed, as such directors, to file an annual report in January 1886, and in January, 1887. These two defaults are stated, respectively,

in the first and second causes of action. The complaint contains five causes of action, but on this appeal only the first and second are involved.

The debt which the plaintiff in this action seeks to collect of defendants is represented by a promissory note, dated October 6, 1886, made by T. F. Witherbee to the plaintiff's order for eleven thousand and seventy-two dollars and sixty-eight cents, payable six months after date, and indorsed by the Port Henry Steel & Iron Company through its treasurer, Andrew Dickey. This note was a renewal of a similar note dated six months earlier, to wit, April 3, 1886. The report due January, 1886, was not filed. The report that was due January, 1887, was filed on February 16, 1887.

The Port Henry Steel & Iron Company was incorporated under the Laws of 1875, chapter 611, and it is sought to charge the defendants, as directors, by virtue of the provisions of section 18, which provides, in case of failure to file the annual report, that "all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made."

If the plaintiff is to succeed in this action, he is bound to prove either that, at the time of default in filing the annual report, the debt in suit existed, or that it was contracted before the overdue report was filed. The default continued from January, 1886, to February 16, 1887.

⁶⁵³ The position of the defendants is, that whatever obligation was assumed by the Port Henry Steel & Iron Company is expressed by the indorsement on the back of the note, and the relation of the company to the debt is thereby fixed; that, in order to make the company liable upon this contract, it was necessary that the note should become due; that the maker should refuse to pay it; that payment of it should be demanded and the note duly protested; that, as protest was not made until April 9, 1887, no debt of the corporation existed, or was contracted, during the period of default in filing the annual report.

The position of the plaintiff is, that when the original note and the renewal note were given by T. F. Witherbee, he was the superintendent and an officer of the company, and that the note was indorsed, delivered, and accepted in payment for a balance due plaintiff for material furnished and labor done prior to December 12, 1885, in constructing a steel plant for the manufacture of steel and iron on the land of the corporation under a contract with Witherbee; that the plant was intended for and

was used by the corporation; that the contract was adopted by it; that it made various payments to the plaintiff on account, and that it indorsed the note in suit, intending to become surety for its payment and to procure credit for Witherbee and itself. The pleadings and the proofs will be examined more in detail later.

The case was tried at a jury term, and the plaintiff gave evidence tending to prove the position already outlined. At the close of plaintiff's case, the counsel for defendants moved to dismiss the complaint on a number of grounds covering the five separate causes of action. As to the first and second causes of action, the only ones involved on this appeal, the court granted the motion on the ground that during the period of default in filing the annual report the liability of the corporation to the plaintiff was merely contingent, and did not ripen into a debt until the protest of the note in April, 1887, when the default no longer existed.

654 The plaintiff duly excepted to this ruling, and the general term of the superior court of the city of New York affirmed the judgment entered at the trial. A preliminary point is taken here by defendants, that the question whether the corporation is liable otherwise than as an indorser is not open on this appeal, as it was not urged on the motion to dismiss.

The question is raised by the pleadings and the proofs, and the exception to the ruling dismissing the complaint calls upon us to determine whether, upon the plaintiff's proofs, he was entitled to go to the jury: *First Nat. Bank v. Dana*, 7 N. Y. 108; *East Hampton v. Kirk*, 68 N. Y. 459; *Frecking v. Rolland*, 53 N. Y. 424; *Stone v. Flower*, 47 N. Y. 566.

It becomes necessary to examine the issues and the evidence more in detail. The complaint avers as to the first and second causes of action as follows: "That said Port Henry Steel & Iron Company, Limited, by its treasurer, or agent, thereto duly authorized, with the intent and purpose of becoming surety for the payment of said note, and with the intent and purpose of inducing this plaintiff to give credit to said Witherbee and to said corporation, and to forbear action against them, and each of them, upon said indebtedness, duly indorsed said note at or before the delivery thereof to this plaintiff, intending that this plaintiff should accept the same upon the strength of said indorsement. That this plaintiff, upon the strength of said indorsement, did accept said note, and gave credit to said Witherbee and said corporation, and forebore action upon such indebt-

edness against them, and each of them, as is hereinafter stated."

The answer denies these allegations of the complaint, and at the trial the plaintiff offered proof tending to sustain them. It appears that the case contains all the evidence and that plaintiff's proofs were admitted without objection.

The salient facts established by the plaintiff are as follows, viz.: The Port Henry Steel & Iron Company, Limited, was not fully organized until the latter part of May, 1885, and ⁶⁵⁵ earlier in that month a proposition was drawn by plaintiff and addressed to the company offering to deliver to the latter its steel plant for twenty-one thousand, four hundred and fifty dollars.

This proposition was accepted by T. F. Witherbee as superintendent of the company. It was then discovered that this contract antedated the formation of the company, and thereupon a second proposition was made out, being like the former one, except it was addressed to T. F. Witherbee individually, and was subsequently accepted by him in that capacity. The plaintiff went on and erected this steel plant on the premises leased by the company for the transaction of its business, and Witherbee never paid anything on the contract, but several payments were made by the company, reducing the indebtedness to the amount of the note referred to in the complaint, which is the balance due plaintiff.

Plaintiff, about April, 1886, was pressing for his money, and it was finally arranged that Witherbee should give him his note, which was dated April 3, 1886, indorsed by the company. At or about this time Witherbee assigned to the company his contract with plaintiff to furnish the steel plant.

Mr. Dickey, the treasurer of the company, testified: "I told Witherbee that we had paid about half the price of the plant, that we gave a note for the balance or indorsement on the note for the balance, and we must have the plant for security for that, and Witherbee agreed to do so—to transfer it, to make such transfer—which he did. I think it was a few days before I indorsed that note that I obtained this transfer. The company was then in possession of this plant, and continued in possession of it until some time in August, 1886; it was operating the plant up to that time. At the time this note was indorsed that plant was the only plant the company had for manufacturing steel, and the only one they ever had, to my knowledge.

Witherbee refused to give the original note of April 3, 1886, to plaintiff unless it was indorsed by the company, as he had no interest in the transaction.

⁶⁵⁶ Witherbee swears that he made out the note of April 3, 1886, and the renewal thereof October 6, 1886, upon the direction of the treasurer of the company, and that he never received any consideration therefor.

The company used this steel plant as its own from the time it was delivered, and, when financially involved, executed a mortgage thereon to its creditors before the first note matured. The company seems to have exercised exclusive dominion over the property in every way.

The plaintiff and appellant now insists that, in this condition of the record, it was error to have dismissed the complaint. While the question now presented is somewhat novel and not without its difficulties, we are of opinion that, in accordance with well-settled general principles, parol evidence, as between the original parties, was admissible to show the real transaction. The liability of the defendant directors depends upon what the real relations of the company are to this matter. The issues involve the entire history of this transaction between the original parties--no rights of third persons have intervened.

Mr. Daniel, in his work on Negotiable Instruments, section 710, in commenting on the general admissibility of parol evidence to ascertain intention as between immediate parties, uses this language: "When the note is negotiable, the question is by no means capable of such easy and satisfactory solution; but whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur, though not with entire unanimity, that, as between the immediate parties, the interpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction."

In section 711 the same writer says: "The ground upon which parol proof of intention and agreement in such cases is ⁶⁵⁷ admitted is that the position of the name upon the paper is one of ambiguity in itself—that it is not a complete contract as in the case of indorsement by the payee, which imports a distinct and certain liability; but rather evidence of authority to write over it the contract that was entered into, and that parol proof merely discloses and brings to light the terms of the unwritten contract that was made between the parties."

A large number of cases in this state have recognized the above principle, and the contract of indorsement has been varied and qualified by parol evidence.

In *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326, it was held that one who, for the accommodation of the maker, indorses his note payable to a third person, is liable thereon to such payee as indorser. The plaintiff alleged in his complaint and proved at the trial that the note and indorsement were made with full knowledge that plaintiff took it in payment for coal sold and delivered to the maker.

In *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, S. B. S., a cashier, sent to the plaintiff to be discounted a bill of exchange of S. B. S., Cash., indorsed by him, with the same addition to his signature, and inclosed in a letter dated at the banking house, and signed S. B. S., Cash.

It was held, after receiving parol evidence of the entire transaction, that the circumstances imported that the indorsement was that of the bank in the regular course of business, and not that of S. B. S. individually.

In *Meyer v. Hibsher*, 47 N. Y. 265, the action was upon a promissory note brought by the payee against the indorser; the complaint alleged that the note was executed and indorsed as a condition of a loan by the payee to the makers, and as security for the payment thereof, and then set out the note which, by its terms, was given "for value received."

This court held that the averments were sufficient to authorize evidence of the indorser's privity with the negotiation, and that if he indorsed with full knowledge of the facts, he was placed in the same condition to the payee as though it had been done by agreement.

⁶⁵⁸ In *Coulter v. Richmond*, 59 N. Y. 478, it was held that the presumption that one who has indorsed a promissory note in blank, before the delivery to the payee, intended to become liable simply as second indorser and so not liable to the payee, may be rebutted by parol proof that the indorsement was made to give the maker credit with the payee. To the same effect are *Jaffray v. Brown*, 74 N. Y. 393; *Good v. Martin*, 95 U. S. 90; *Patch v. Washburn*, 16 Gray, 82. The same principle is recognized in the following cases: *Phelps v. Vischer*, 50 N. Y. 69, 10 Am. Rep. 433; *Clothier v. Adriance*, 51 N. Y. 322; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562; *Hubbard v. Gurney*, 64 N. Y. 457; *Breneman v. Furniss*, 90 Pa. St. 186, 35 Am. Rep. 651.

We thus see that between the original parties the apparent rights of the indorser on the face of the note and contract of

indorsement are constantly qualified and changed by parol evidence.

In the case at bar, the plaintiff seeks to charge the directors of a corporation, and the latter endeavor to avoid liability, by insisting that on the face of the note and indorsement the corporation is a strict indorser, only contingently liable when the paper is due and the company is charged; also that protest was after annual report filed.

This plaintiff, payee, urges that both on principle and authority he should be allowed to show the real transaction, the true situation, in order to establish that this corporation was privy to the consideration of the note, and was on the facts liable to the plaintiff, and that its directors cannot shield themselves behind the technical defense of the strict contract of indorsement.

We are of opinion that the parol evidence showing the history of the indebtedness which resulted in the notes in question was properly received and should have been submitted to the jury.

The defendants' counsel has cited the case of *Hall v. Newcomb*, 3 Hill, 233, 7 Hill, 416, 42 Am. Dec. 82, as a controlling authority ⁶⁵⁹ against the plaintiff on this appeal. The question in that case was whether a person who puts his name in blank upon the back of a negotiable note, which is drawn in such form that he may be charged as indorser in the usual mode, if a demand is made and notice of nonpayment given, can be charged as a general surety, without such demand and notice by parol evidence merely. It appeared that the holder of the note had neglected to make demand and give notice of nonpayment to the indorser, and then sought to hold him, after he was discharged, by showing a different contract.

On the special facts of that case it was well decided and is not in conflict with plaintiff's position here, or the cases to which reference has already been made.

In the case at bar, the note was duly protested, and the question here does not concern protest, but is one between the plaintiff and the directors of the corporation, based on the real relations of the corporation to the plaintiff's claim.

In *Hall v. Newcomb*, 3 Hill, 233, 7 Hill, 416, 42 Am. Dec. 82, no such question arose as is here presented. It was not claimed that Newcomb had received the consideration of the debt—was, in fact, the debtor. It was an effort to hold him as guarantor when, under the facts, he was a strict indorser. *Spies v. Gilmore*, 1 N. Y. 321, is to same effect.

The counsel for the plaintiff has sought, on this appeal, to maintain two distinct propositions, among others, viz.: The first one is that the ordinary contract of indorsement creates a debt when entered into without regard to the subsequent maturity of the note, demand and due protest.

The case of Barclay v. Weaver, 19 Pa. St. 396, 57 Am. Dec. 661, and other cases in foreign jurisdictions, are cited to the effect that demand and notice are no part of the contract, but only steps in the legal remedy upon it. We express no opinion on this proposition as to its correctness, or whether it is an open question in this state.

The other proposition is, in substance, that if, as between the parties, the indorser is shown to be the principal debtor, the note having been made for his accommodation, or, in ⁶⁰⁰ other words, that he has no recourse against the maker, then demand and notice were not necessary; that it was not the strict contract of indorsement.

In Commercial Bank v. Hughes, 17 Wend. 94, Judge Cowen says: "Where the indorser or drawer has plainly suffered nothing, and can sustain no mischief for want of demand and notice, none need be made or given; and it accords with the true and only reason why such demand and notice are called for. The question seems to be merely one of evidence. The drawer or indorser is presumed to have been injured by the omission, until the plaintiff, by proof on his side, remove all chance of damage."

In Mechanics' Bank v. Griswold, 7 Wend. 168, Judge Nelson, in speaking of when notice to the indorser is not necessary, goes on to say: "Thus, where the indorser is himself the debtor, as where the note is discounted for his accommodation, and the money raised upon it is received by him, and therefore he ultimately holden to pay it, it is obvious that the reason of the rule cannot apply": See, also, Ray v. Smith, 17 Wall. 415; Story on Promissory Notes, secs. 268, 357.

The plaintiff's counsel bases on this second proposition the argument that if he succeeds in establishing a state of facts that shows the indorser was himself the debtor and not entitled to due notice of protest, then the debt that is sought to be collected of the defendants, as directors of the corporation, was either contracted when the first note was given, April 3, 1886, or was at that time an existing debt, having its origin when the steel plant was delivered by plaintiff to the corporation.

We are of opinion that this is a question that the plaintiff is entitled to litigate on a new trial, and if he succeeds in show-

ing to the satisfaction of a jury that the corporation is really the principal debtor of the plaintiff in this transaction, then the debt did not arise at the time of due notice of protest, but existed when the original note was given on the third of April, 1886.

⁶⁶¹ The defendants raised the point at general term and again urge it here, that the plaintiff is not entitled to recover under the second cause of action, to wit, the failure to file a report within twenty days after the first day of January, 1887, for the reason that in August, 1886, the company abandoned its business and franchises, and turned over all its property to its creditors.

It is sufficient answer to this point that the plaintiff's debt, if this action is to be maintained, was contracted and existed prior to August, 1886, when it is alleged that the corporation ceased to exist. As the record now stands, however, it is quite clear that the corporation did not cease to exist in August, 1886. On August 13, 1886, the corporation released and surrendered to certain creditors property described, in consideration of extending payment of its indebtedness, with covenant on part of creditors that they would return the property to the corporation at any time prior to January 1, 1887, on conditions named. On the twenty-fourth day of August, 1886, the corporation mortgaged certain personal property to the same creditors.

It was proved that these transfers did not embrace all of the property of the corporation, and some of the omitted portion was hypothecated to secure other creditors. The real significance of these transactions consists in the fact that the company exercised acts of absolute ownership and dominion over certain of the property involved in this action.

In addition to this the record discloses that the corporation filed in the office of the secretary of state on the twenty-eighth day of January, 1887, a certificate of payment of the entire capital stock of the company, and that on the eighteenth day of February, 1887, and in January, 1888, filed in the same office its annual reports. It thus appears that the company did not cease to exist in August, 1886.

The counsel for the appellant argues one exception to the rejection of evidence. ⁶⁶⁴ The deposition of the makers of the note was read on the trial and the witness was asked this question: "Q. Did the company agree to relieve you from the payments which you were to make?" This was objected to as immaterial, irrelevant,

and incompetent, because it is not the best evidence. There was no evidence that the agreement referred to was in writing. The proper objection to the question was that it called for a conclusion as to the nature of the agreement. As the error in this ruling was at best technical the plaintiff is not in a position to urge his exception. The information sought for was relevant under a proper form of question.

The judgment appealed from should be reversed and a new trial granted, and with costs to the plaintiff in all the courts to abide the event.

All concur, except Parker, C. J., and O'Brien, J., not voting.

NEGOTIABLE INSTRUMENTS — CORPORATIONS—PAROL EVIDENCE TO VARY CONTRACT OF INDORSEMENT.—Parol evidence is always competent to show the real agreement and relations of the parties to a note. If the indorsement upon the back of it is in blank, or the names of the parties are so placed upon it, or the contract is so ambiguous upon its face, as to leave it doubtful what the real intention of the parties is, parol testimony may be resorted to in order to establish the true relation of the parties to the note and to each other: Notes to Ewan v. Brooks-Waterfield Co., 60 Am. St. Rep. 727; Kulenkamp v. Groff, 15 Am. St. Rep. 287, 288. Compare note to Drennan v. Bunn, 7 Am. St. Rep. 366. As between the parties to a negotiable instrument, a blank indorsement may be modified by parol evidence, and the entire transaction may be thus shown, although resting partly in writing and partly in parol: Holmes v. First Nat. Bank, 38 Neb. 326, 41 Am. St. Rep. 733. A negotiable note given by a corporation is binding: Mott v. Hicks, 1 Cow. 513, 13 Am. Dec. 550; but whether a corporation alone is bound by a writing signed by its officers, or whether the latter incur personal liability, is a question of intention to be determined from what appears on the face of the writing: Yowell v. Dodd, 3 Bush, 581, 90 Am. Dec. 256.

HERTER v. MULLEN.

[159 NEW YORK, 28.]

LANDLORD AND TENANT—HOLDING OVER—WHAT NECESSARY TO CONSTITUTE.—A holding over by a tenant after the expiration of his lease for a year, so as to render him liable for another year's rent, must be by such voluntary act that the law implies a contract on his part, or leasing of the premises for another year. Such implication does not arise from his act due to any stress of circumstances which involves peril to his life, or that of some member of his family.

LANDLORD AND TENANT—HOLDING OVER—RETENTION OF POSSESSION CAUSED BY SICKNESS.—If a tenant by the year, intending to surrender the premises at the end of his term, is obliged to retain a room in the leased house for a short period of time after his lease expires in order to avoid the peril of exposing a sick member of his family to danger or death, this is not

a holding over within the meaning of the rule that if the tenant holds over the landlord may continue the lease and recover rent for another year.

LANDLORD AND TENANT—HOLDING OVER—OMISSION TO SURRENDER PREMISES, WHAT EXCUSES.—The failure of the tenant to surrender the premises upon the expiration of his term is excused when rendered impossible by act of God, unavoidable accident, or stress of circumstances imperiling his life, or that of some member of his family, so far as his liability to pay rent for another term is involved by his holding over under such circumstances.

B. J. Tinney, for the appellants.

G. P. Smith, for the respondent.

³⁰ O'BRIEN, J. The plaintiff's action was to recover rent alleged to be due upon the lease of certain premises for the month of May, 1895, and the six following months of that year. The lease was executed in March, 1894, and was to terminate in one year from the 1st of May following. The defendants, who were the tenants under the lease, vacated the premises on May 15, 1895, but as it was claimed that they held over after the expiration of the lease for fifteen days, it was held that they were liable for the rent for another year, and the plaintiff recovered for the seven months of the year that had elapsed before the commencement of the action. The rent, by the terms of the lease, was payable monthly, and the court directed a verdict for the plaintiff for five hundred and fifty-eight dollars and sixty-three cents, being the stipulated rent for the seven months, with interest.

The complaint alleged the making of the lease, the possession thereunder by the defendants, and that they had continued in possession until the time of the commencement of the action. The defendants, in their answer, allege that they surrendered possession of the premises to the plaintiff on May 15, 1895, and that he accepted such surrender; that they had notified him in the month of February preceding that they would not take or keep the house for another year after May 1, 1895, when the term fixed by the lease expired; ³¹ that after this notice the plaintiff was permitted to show the premises to persons wishing to hire or purchase them, and to place upon the house the usual notice that it was to let; that the defendants moved from the house with all their property and belongings, and that of the family, on the first day of May, 1895, before the lease expired, except from the bedroom where their mother was confined by a dangerous illness until the 15th of May following, when she

was removed and the premises wholly vacated, and that they were forbidden by the physician in charge from moving or disturbing the mother during the fifteen days, and were informed by him that it would imperil her life if an attempt was made to remove her. These affirmative allegations in the answer were pleaded together as a single defense. On the trial it was conceded that the defendants had the affirmative of the issues, since the written lease was produced and admitted by the pleadings and the possession under it.

It appears from the record that the defendants' counsel then proceeded to open the case to the jury, and at the close of the opening the court suggested that the controversy would resolve itself into a pure question of law, and that the facts should be agreed upon. The plaintiff's counsel then admitted that the notice from the tenants of their intention to surrender up the premises on the 1st of May had been given in February, as alleged in the answer. The defendants' counsel then stated that the reason for holding over after the expiration of the lease was the sickness of the defendants' mother, she then being a member of their family, and he stated that unless he could have it admitted as it is pleaded that he wanted no admission whatever. The plaintiff's counsel then admitted that fact, as set forth in the answer. The last clause of the answer contained an allegation that the holding over was with the knowledge and permission of the plaintiff, the landlord, and at the suggestion of the plaintiff's counsel this allegation was withdrawn. The case then states that upon the record and the defendants' counsel's opening, the court, at the request of the plaintiff's counsel, directed a verdict against the defendants ³² for five hundred and fifty-eight dollars and sixty-three cents, and that the defendants excepted to this direction.

It is somewhat difficult to ascertain from the record just what questions were passed upon by the court at the trial. It is clear enough that he held that the defendants were liable for another year's rent from the 1st of May, 1895, notwithstanding the facts alleged in the answer in respect to the illness of the defendants' mother, and the impossibility of her removal without endangering her life.

The learned court must also have held that the other allegations of the answer pleaded in connection with the fact just referred to, that upon the removal of the mother on the fifteenth day of May, 1895, the defendants surrendered the premises to the plaintiff, and that the latter accepted such surrender, was

not available as a defense. In view of the fact that the defendants were requested to withdraw a particular clause in the answer, which was complied with, and of the further fact that the case states that a verdict was directed upon the record and the opening of the defendants' counsel, it must, I think, be assumed that the decision was that the answer contained no defense after the allegation had been withdrawn, which stated that the holding over was with the consent of the landlord. After the defendants' counsel had withdrawn this allegation he stated that he desired to have the other facts admitted just as he had pleaded them, and this request was complied with. The admission, therefore, must be held to cover all the facts affirmatively pleaded in the answer, except the particular allegation which had been withdrawn. After verdict was directed against the defendants it would not be a fair construction of what took place at the trial to hold that the admission applied only to the single fact of holding over on account of the sickness of the mother. It must, think, be held that it was an admission of all the facts affirmatively pleaded, except the single allegation which the plaintiff's counsel requested to be withdrawn. The direction having been made upon the opening of the plaintiff's counsel, which does not appear in the case, and upon the record, the fair construction is that a verdict ³³ was directed upon the answer, after modification by the withdrawal of the allegation referred to and upon the opening of counsel. The record in this connection must mean the pleadings in the case: *Kley v. Healy*, 127 N. Y. 555.

It was, therefore, admitted by the plaintiff's counsel that fifteen days after the expiration of the term provided by the lease the tenants surrendered the premises to the landlord and that the latter accepted the surrender. After the surrender there could be no recovery of rent, since the landlord could not have the use of the premises and the stipulated rent at the same time. When a landlord accepts a surrender of the premises, this act operates to discharge the tenant from all liability for rent in the future, and if the construction of the proceedings at the trial suggested be the correct one, then the direction of a verdict against the defendants was error.

But perhaps the most important question in the case arises upon the facts and circumstances which it is claimed constitute a holding over by the tenant after the expiration of the term specified in the lease. For every purpose necessary to the determination of that question we must assume that the facts are as

alleged in the answer, since it must have been upon that assumption that the verdict was directed. There can be no doubt that the rule of law is settled beyond debate or controversy which permits the landlord, at his election, to treat the tenant as holding for another year when the latter remains in possession after the expiration of the term. When the demise is for a definite term of one year at a fixed rent and the tenant holds over after that term expires, the landlord may treat him as a tenant for another year and collect rent accordingly: *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636; *Adams v. Cohoes*, 127 N. Y. 182. But the question is whether the tenant did in fact hold over after the expiration of the term, within the meaning of that rule. If it is an arbitrary one, applicable under all circumstances and conditions, and to be enforced in every case without regard to the reason upon ³⁴ which it is founded, it may be said that in a strict sense there was a holding over in this case. But this rule that obtains in the relation of landlord and tenant is a part of the common law, the chief merit of which is supposed to consist in its adaptability to changing circumstances and new conditions as developed in the progress of time. It is not an unchangeable code, like that of the Medes and Persians, but a system that has grown up with the growth of civilization, and is capable of being molded to meet the wants of society in every stage of its progress. From the facts disclosed by the answer in this case the tenant vacated the house at the expiration of the term, except one bedroom in which a member of his family was confined by illness so serious that he was warned by the physician that any attempt to remove her would imperil her life. The decision of the learned trial court in the case virtually holds that on the last day of the tenant's term he was placed in a position where he must either pay rent for another year for a house that he did not intend to occupy, or to take the risk of becoming, in a certain sense, responsible for the death of his mother by attempting to remove her from a sickroom against the protest of a physician. This would seem to be pushing a rule of law applicable to the relation of landlord and tenant to a point which makes it very unreasonable, if not absurd, and, before assenting to such an application of it, we are naturally forced to inquire whether there was in fact any such holding over by the tenant in this case as the rule fairly contemplates. Does a tenant who, on the last day of the term is upon his deathbed, or is quarantined in his house by the public authorities to prevent the spread of some dangerous or in-

fectious disease, or is insane or compelled to remain in the house against his will by some superior force or stress of circumstances, hold over within the meaning of the law, or in the sense that permits the landlord to treat him as a tenant for another year? The principle upon which the rule is founded is that the holding over is such an act of the tenant that the law implies a contract on his part, or leasing of the premises for another year. But whenever the law ³⁵ implies a contract from the act or conduct of the party, the act itself, whatever it may be, must be voluntary. The law does not imply a contract or obligation from an act of the party which proceeds from mistake or fraud, or which results from force or coercion of any kind, or is due to any stress of circumstances which involves peril to his life or that of some member of his family. To infer a promise or contract from any act plainly resulting from such causes would manifestly be contrary to reason and justice. The question, therefore, occurs whether the tenant in this case, by failing to remove his mother from the bedroom in the house, or by her presence there during the fifteen days after the expiration of the term, should be held for another year's rent, on the principle that an agreement to hold for another year is to be implied by law from his conduct under the circumstances. If this question must necessarily be answered in the affirmative, there would be no grounds for any further discussion. But it seems to me that, upon reason and all the analogies of the law, a hiring for another year cannot and should not be implied against the tenant under such circumstances. The case is not within the reason of the rule, and, therefore, is not governed by it. While this court has firmly adhered to the principle that the landlord is entitled to treat the tenant who holds over as lessee for another year, it is plain, from what was said in one of the most recent cases, that the rule was not considered an arbitrary one. On the contrary, it is intimated that it was not so rigid that it could not properly be made to bend in exceptional and peculiar cases: *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636. Where the holding over is wrongful or voluntary, and not unavoidable in the strictest sense, the rule must be permitted to have full application. But where the tenant, as in this case, is obliged to retain a room in the house for a short period of time in order to avoid the peril of exposing a member of his family to danger and death, it cannot properly be said that it is a holding over within the meaning of the law. Where a party acts under such a stress of circumstances, the act cannot be said to proceed from

his own volition any more than if he ³⁶ had been detained in the house by the police under the direction of the health authorities.

In *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, this court enforced the rule in a case where the facts were quite different from those appearing in the record now before us. In that case, however, the learned judge who spoke for the court evidently had in mind some case which might be considered an exception to the rule. That is the plain inference from the following paragraph of the opinion: "I do not mean to say that whether there has been a holding over at all may not some times be so doubtful upon the facts as to require a submission to the jury. I mean to say that there is no such doubt in the present case. I reserve the question, also, whether there might not be an unavoidable delay, in no manner the fault of the tenant, directly or indirectly, which would serve as a valid excuse. It is enough that here was a holding over not unavoidable, which might have been provided against, and where the chief difficulty grew directly out of the tenant's own wrongful act." In *Jones v. Shears*, 4 Ad. & E. 832, the defendants had rented a coal mine for twenty-one years, with the proviso that they might terminate the tenancy at any time by giving a previous notice to that effect. The term commenced in April, 1825, and four years thereafter the defendants gave the notice provided for. They, however, continued in possession for two months after the expiration of the time limited by the notice, working the mine. The landlord brought an action for the rent, claiming that the holding over gave him the right to treat them as tenants at the former rent. The defendants claimed that this holding over was not with any intent to waive the notice and renew the tenancy, and that they had the right to show the circumstances under which they so held over. Upon this question of intent they, therefore, proposed to show that the coal worked by them during those two months was taken from pillars of coal which supported the roof of the mine, and that it was customary for the tenant, on leaving the mine, to cut away as much coal as could with safety be removed. This evidence was allowed, and Coleridge, J., left ³⁷ it to the jury to say whether, under the circumstances, the defendants held over with the intent to waive the notice and continue the tenancy or not. The jury found a verdict for the defendants, and a subsequent motion for a new trial was denied. Upon appeal to the king's bench, the ruling at the trial was affirmed, Lord Denman, chief justice, saying:

"It was impossible upon this issue not to leave the question to the jury, and it was for them to decide whether the parties, by their mode of continuing in possession, showed an intention to waive their notice to quit and to remain tenants as before." Littledale, J., also said: "I do not know that where a tenant holds over he is always to be considered as bound to hold upon the same terms as far as they are applicable. . . . Here, however, the question was not whether the parties held over on the terms of the original tenancy, but whether they held over as tenants at all. It was for the jury to say whether the defendants intended to avail themselves of their notice to quit, or whether the acts done by them amounted to a waiver of such notice." In *Chitty on Contracts*, eighth American edition, pages 286, 287, after discussing the effect of the receipt by the landlord of rent after the expiration of the term, and a holding over by the tenant, the learned author adds: "And both the fact of holding over and the payment of rent may be explained so as to rebut the presumption that the parties intended thereby to create a tenancy from year to year." The law in many cases excuses a party from the performance of a contract or some other act when disabled by sickness. Such was the decision of this court in a case where a party had contracted to render personal services for a specified time, but after a partial performance was disabled by sickness. It was held that, notwithstanding the nonperformance by reason of this disability, the person rendering the services was entitled to recover upon a quantum meruit: *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388. The disability of a party to do the particular thing, or to perform the contract by reason of sickness is held to be a disability by the act of God. So it has been held that sureties upon a recognizance to secure the ³⁸ attendance of the principal at court to answer to a criminal charge may, when sued upon the recognizance, defend upon the ground that the principal was disabled from attending by reason of sickness: *People v. Tubbs*, 37 N. Y. 586. The general rule is, that where the performance of a duty or charge created by law is prevented by unavoidable accident without the fault of the party, he will be excused: *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Mill Dam Foundry v. Hovey*, 21 Pick. 441.

It is important to note with more distinctness the wide difference between this case and *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636. In that case, the tenant violated one of the covenants of the lease by subletting the premises. The sub-

tenant held over after the expiration of the term, and the tenant was sued for rent upon the principle that the holding over created a tenancy for another year. The tenant sought to excuse the holding over by the allegation that a distant relative of the subtenant, who was in possession, was detained in the house after the expiration of the term by sickness. This court held that inasmuch as the subletting was in violation of the lease and was a wrongful act on the part of the tenant, that he could not be excused by a situation which was plainly the result of his own violation of a covenant of the lease. It is plain that the situation which it was claimed excused the tenant was of his own creation by putting another party in possession of the premises. The holding over in that case was very properly attributed to the wrongful act of the tenant in putting a stranger into possession of the demised premises.

When a tenant for a year actually holds over after the expiration of the term, the legal consequences which follow are well settled and understood. The landlord may, at his election, treat him either as a trespasser or a tenant for another year, but in any case the fact of holding over must be established. The landlord cannot treat him as a tenant and collect the rent for another year, unless the facts are such as to justify him in proceeding against him as a trespasser. An act which might ordinarily constitute a trespass, when done or committed ³⁹ intentionally or voluntarily, cannot always be such when done or committed involuntarily: *Moak's Underhill on Torts*, 10, 15. The mere fact that the tenant or some member of his family is obliged to remain in a room in the house after the expiration of the demised term may not necessarily amount to a trespass. Whether it does or not must depend upon circumstances. If he is detained there by the act of God or of some superior legal power, or some unavoidable necessity, he is not ordinarily deemed to be a trespasser. A trespass presupposes some wrongful act toward the person or property of another. If the tenant in this case actually held over, the plaintiff could maintain ejectment against him; but since his intention to remove on the day the lease expired is clear, and this purpose was defeated only by the dangerous illness of a member of his family, it would, I think, be difficult to say that he had such a possession of the house as would support an action of ejectment, and the same facts and circumstances that would protect him from such an action would also defeat the present claim, which is based upon the theory of an implied agreement to lease for another

year. I do not mean to say that the facts stated in the answer would be a defense to an action by the landlord for damages based upon the breach of the covenant in the lease to surrender the demised premises at the expiration of the term. A duty or obligation imposed by law and one created by contract or covenant stand upon different grounds when the party seeks to be excused by the act of God or unavoidable accident, or stress of circumstances. But in this case the right of the landlord to collect rent for the second year does not depend upon any express contract or covenant. It rests wholly upon the legal implication derived from the wrongful act of the tenant in holding over, and if that act was not in fact wrongful, but, under the circumstances, excusable, then there is no basis for any implied promise or agreement. I assume that if the tenant, or some member of his family, should die on the last day of the term, that no one would then contend that the continued occupation of the house for a few ⁴⁰ days during the funeral would amount to a wrongful holding over within the meaning of the law. Such an interpretation of a principle of the common law would shock not only our sense of justice, but every feeling of decency and humanity. The case before us differs from that only in degree. Both cases must be governed by a common principle. It is obvious that in the application of the rule now under consideration to the relation of landlord and tenant there must be a point beyond which we cannot go, and that point is reached when the alleged holding over cannot be attributed directly or indirectly to some fault on the part of the tenant. There may be cases in which the occupation of a room in a house after the lease has terminated will not amount to a trespass or warrant the implication of a lease for another year. Since a party cannot, as a general rule, commit a trespass or make a contract without some effort of volition on his part, an act due to unavoidable accident or resulting from some overruling necessity or stress of circumstances can form no basis for imputing a wrong or inferring a contract. It is reasonable, therefore, to conclude from the facts and circumstances stated in the answer that the defendant was not a trespasser during the fifteen days that his mother occupied the room in the house and could not be removed without endangering her life, nor a tenant for another year. It follows, therefore, that the plaintiff was not entitled to recover rent from the time when the house was completely vacated.

It may be said that this conclusion is a departure from precedent, but it is not easy to see how it is. No case has been cited and none has been found where it was held that such a state of facts, or such a situation as is disclosed by the answer, amounted to a holding over by the tenant within the meaning of the rule that is invoked by the landlord to sustain this action. Legal rules may sometimes be pushed to a point where they accomplish the grossest injustice, and it then becomes the duty of the courts to limit their application to cases that are within their true scope and fair meaning. We go no further than to say that, upon the facts stated in the ⁴¹ answer, if conceded or established, there was no holding over by the tenant within any fair or reasonable meaning of the rule which permits the landlord to continue the lease for another year.

The judgment should be reversed and a new trial granted, with costs to abide the event.

MARTIN, J. This action was to recover seven months' rent of a dwelling-house situated upon Madison avenue in the city of New York. There was a lease between the parties by which the defendants rented the premises from May 1, 1894, for the period of one year, the rent payable in monthly installments in advance. The rent for that term has been paid. By this action the plaintiff seeks to recover rent for a portion of the succeeding year, on the ground that the defendants held over after the expiration of their term, and thus became liable for the rent of the premises for that time.

The facts are undisputed. The defendants alleged as a defense to the action the making of the contract or lease with the plaintiff; that in the month of February, 1895, before the expiration of their term, they notified the plaintiff that they would not retain the premises for another year, and that after such notice the plaintiff and his agents were permitted to show the premises and to place the usual notice "To Let" upon them, which remained during the balance of the term. The defendants then specially alleged that on May 1, 1895, the defendants were prevented from yielding up the possession of the premises by the act of God in afflicting their mother, who was a member of their family, with a disease which, at that time, previously and subsequently, including May 15th, confined her to her bed so that it would have endangered her life to take her from the house; that for that reason and no other, of which the plaintiff had full knowledge and notice, the defendants were obliged to

and did occupy a small portion of the premises until May 15th; that all their property, furniture and belongings and their family were removed from the premises, and every part thereof on May 1, 1895, except ⁴² from the sickroom in which their mother was confined, and that they were forbidden by the physician in charge to remove her until May 15th, when she was at once removed.

Upon the trial it was admitted that upon the 1st of February, 1895, the defendants notified the plaintiff that on the 1st of May they would give up and surrender the possession of the premises. That they were occupied under the lease was admitted, also the rate of rent, and the fact that the defendants from necessity held over after the expiration of the lease some fifteen days. The plaintiff then admitted the facts set up in the answer as to the impossibility of the defendants' surrendering possession at the expiration of the year, so that the question presented is whether, notwithstanding the facts alleged in the answer, the plaintiff was entitled, as a matter of law, to recover rent for the succeeding year, upon the ground that the defendants held over after the expiration of their term.

The admission of the plaintiff amounts to a concession that by reason of the sickness of the defendants' mother it was impossible for them to surrender up the possession of the premises to the plaintiff; that so far as it was possible they did so; and hence that their retention was wholly involuntary. If there was any doubt as to the question of impossibility, it should have been submitted to the jury, and the defendants' exception to the direction of a verdict was well taken. Thus, in a word, the question is whether that impossibility justified the defendants' action, or whether, although it was impossible to surrender the entire premises, the holding of a small part for a few days imposed upon them a liability for rent for the succeeding year.

It is well settled that where a tenant voluntarily holds over after the expiration of his term, he may be held as upon an agreement to hold for a year upon the terms of the prior lease: *Conway v. Starkweather*, 1 Denio, 114; *Commissioners of Pilots v. Clark*, 33 N. Y. 251; *Haynes v. Aldrich*, 133 N. Y. 287, 289, 28 Am. St. Rep. 636.

The basis of this liability is often said to be an implied agreement ⁴³ upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as duties which the law imposes, yet, whether they be

denominated implied contracts or duties created by law, in either case the right arises upon an implication of law and in no sense upon an express or absolute contract.

It is also well settled that where a duty or charge is created by law, and the performance is prevented by inevitable accident or the act of God, without fault of the party sought to be charged, he will be excused, but where a person absolutely and by express contract binds himself to do a particular thing which is not at the time impossible or unlawful, he will not be excused, unless through the fault of the other party. The reason given for the latter portion of this rule is that he might have provided by his contract against inevitable accident or the act of God: *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415.

Thus the most that can be said of the obligation that arises from the relation of landlord and tenant and follows by a general lease, is that the tenant is charged with the duty of vacating the premises at the end of his term. If he fails, it is a breach of his duty, and ordinarily the law implies or creates a liability on his part for another year's rent. This being a duty implied or created by law and not by an express or absolute agreement, it falls within the first part of the foregoing rule, and hence it is obvious that if the tenant's removal was rendered impossible by inevitable accident or the act of God, he is excused for his omission to surrender the premises, at least so far as it creates a liability for a year's rent which is implied by law.

The reason for the distinction between the effect of impossibility of performance, occasioned by inevitable accident or the act of God, upon an obligation created by express contract, and upon an obligation which the law implies, has been held to rest "upon the unwillingness of the law to at once ⁴⁴ create, impose, and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence": *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371. Under the principle of the authorities relating to this subject, I think it is clear that, as the obligation sought to be enforced was one created by law and not by the agreement of the parties, impossibility of performance was a valid excuse, and the defendants cannot be held for the rent for the subsequent year.

Moreover, the same result may be reached upon another

ground. There are many cases where the courts have implied a condition in a contract to the effect that a party is relieved from its terms where its performance has, without his fault, become impossible. The principle upon which those cases are based is that, when the contract was made, the parties contemplated that the condition which subsequently existed might arise and render performance impossible, and that the implied condition is to be construed as a part of the existing contract, and thus relieves the party from liability in case that condition arises: *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Lorillard v. Clyde*, 142 N. Y. 456, 462; *Stewart v. Stone*, 127 N. Y. 507; *Spalding v. Rosa*, 71 N. Y. 40, 44, 27 Am. Rep. 7; *Taylor v. Caldwell*, 3 Best & S. 826; *Robinson v. Davison*, L. R. 6 Ex. 269; *Kein v. Tupper*, 52 N. Y. 550, 555; *Dolan v. Rodgers*, 149 N. Y. 489, 492.

To hold in this case that this agreement was made upon an implied condition that the defendants should not be required to vacate the premises at the expiration of their term in the event that it was rendered impossible by inevitable accident or the act of God is quite within the principle of the authorities cited. But be this as it may, it is manifest that the charge or liability which the plaintiff seeks to enforce was created by law and not by agreement, and that as its performance was prevented without the defendants' fault, they were excused from the onerous liability which the plaintiff now seeks to enforce.

It may well be, and doubtless is, true that the plaintiff may recover ⁴⁵ for the time the premises were occupied by the defendants, or, if by reason of their failure to surrender up the premises additional damages follow, that they may be recovered in a proper action so that all damages caused by the defendants' misfortune would be borne by them, but that he cannot recover the rent for the subsequent year upon the implied contract or duty imposed by law, seems to me clear.

These considerations lead me to the conclusion that the judgment in this action should be reversed and a new trial ordered, with costs to abide the event.

MR. JUSTICE GRAY dissented and maintained that the present case should form no exception to the rule that where there is a holding over by a tenant after the expiration of his lease for a year; the law implies an agreement to hold for another year upon the terms of the prior lease. Such rule cannot "be affected by the fact that the holding over by the defendants was by reason of the illness of their mother, as a member of the family, and, therefore, in that

sense, involuntary. The doctrine has been long a settled one in this state that a tenant who holds over his term, either is a trespasser, or continues to be a tenant, at the sole election of the landlord, and that, in the latter case, the legal implication is that he holds at the former rent. As this appeal should be disposed of upon authority, I shall advert to a few cases and to the opinions which have been expressed. The question was early discussed in what may be regarded as the leading case of *Conway v. Starkweather*, 1 Denio, 113, where the tenant held over his term for the period of two weeks. Bronson, C. J., in his opinion, laid down the rule with considerable pertinency and said that 'the tenant has no such election as that which belongs to the landlord. If he holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterward at liberty to deny that he is in as a tenant, if the landlord chooses to hold him to that relation. If the tenant may hold over for two weeks and then say he is not a tenant, I see no reason why he may not give the same answer after holding over as many months or years. The plaintiff's counsel regards the holding over as only presumptive evidence of the continuance of the tenancy, which would have been sufficiently rebutted by the offered proof that the plaintiff, before his term ended, refused to keep the property another year, even at a reduced rent. But such are not my views. I do not think this a case for balancing presumptions; but one where the act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant; and that it is not in his power to throw off that character, however onerous it may be.' A number of years later, in the case of *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609, the defendants had held over for the period of three weeks after the expiration of the lease and they opposed the claim of the plaintiff to hold them as tenants for the whole year upon the ground that they had given him notice, before the expiration of the term, that they did not intend to keep the premises for another year, and, with his knowledge, had made arrangements to occupy other premises. Judge Earl, relying on the rule of law as settled by *Conway v. Starkweather*, 1 Denio, 113, and since recognized by other cases, that where a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon the terms of the prior lease, overruled their contention and said: 'The safe and just rule I believe to be the one established by authority, that a tenant holds over the term at his peril; and the owner of the premises may treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable.' Still later, in *Adams v. Cohoes*, 127 N. Y. 175, Judge Potter, delivering the opinion of this court, in the second division, discussed this question in the light of the authorities, and observed that, 'so absolute is the implication from holding over for a few days only, of a hiring for another year, that the tenant will not be excused from the pay-

ment of rent, even where he gave the landlord notice before the end of the term that he did not intend to hire for another year, and had hired other premises which would be ready for his occupancy in a few days.' Finally, we have the case of *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, where the holding over by the defendant was from the 1st to the 4th of May, and it was sought to be excused upon these facts, viz., that the first day of May was a holiday; that on the second day of May there was difficulty in engaging trucks, and that a sick boarder could not be moved with safety until the fourth day. Judge Finch discusses, in his opinion, the efficacy of such a defense somewhat elaborately, and, referring to the rule as well settled by authority that, where there is a holding over by the tenant, the law will imply an agreement to hold for a year upon the terms of the prior lease, makes the following observations upon the argument of the appellant: 'The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only when the tenant holds over voluntarily and for his own convenience that the landlord's right arises, and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury, and no lessor would ever know when he could safely promise possession to a new tenant.' Again, he says that, 'if the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however just and wise, but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine and tend to involve the rights of both lessor and lessee in uncertainty and confusion.' This is pretty strong language; but the appellants, nevertheless, seek to distinguish the case as an authority; because there is was a subtenant, whose illness prevented the surrender of possession, and the question was reserved whether there might not be an inevitable delay, in no manner the fault of the tenant, which would serve as a valid excuse. It is true that there is that much of a distinction between the two cases; but I think the distinction to be somewhat shadowy, so far as the excuse for not yielding up the premises promptly is concerned, and I agree with the reasoning of the opinion at the appellate division in the present case, that 'no such qualification should be, or could safely be, imported into the absolute rule of law. It would make the landlord rather than the tenant suffer by reason of a misfortune to the tenant, which he, and not the landlord, should bear the burden of.'" Mr. Justice Gray also cited as supporting his view: *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Moore v. Beasley*, 3 Ohio. 294; *Vrooman v. McKaig*, 4 Md. 450, 50 Am. Dec. 88; *Bacon v. Brown*, 9 Conn. 334; *Hemphill v. Flynn*, 2 Pa. St. 144; *Wolffe v. Wolffe*, 69 Ala. 549, 44 Am. Dec. 526.

Mr. Justice Bartlett and Mr. Justice Vann concurred in the dissenting opinion.

Landlord and Tenant—Holding Over. Tenant, When Guilty of.

It is a universal rule that if premises are let for a year, or from year to year, and the tenant holds over, the landlord may elect to treat him as a tenant from year to year, or, when the renting is for a shorter period, and the tenant holds over, he may be deemed to hold upon the terms upon which he entered, and the landlord may recover rent of him according to the terms of the original contract or lease: *Noel v. McCrory*, 7 Cold. 623; *Hall v. Myers*, 43 Md. 446; *Burbank v. Dyer*, 54 Ind. 392; *Parker v. Hollis*, 50 Ala. 411; *Usher v. Moss*, 50 Miss. 208; *Gardner v. Commissioners*, 21 Minn. 33; *Bacon v. Brown*, 9 Conn. 334; *Quinette v. Carpenter*, 35 Mo. 502; *Laguerenne v. Dougherty*, 35 Pa. St. 45; *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609; *Hayes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636; *Adams v. Cohoes*, 127 N. Y. 182. Or the landlord may, at his election, treat the tenant holding over as a trespasser, and may bring ejectment against him without any previous notice, unless the holding over has been such that it may be presumed that the landlord has assented thereto: *Smith v. Littlefield*, 51 N. Y. 539; *Blain v. Everitt*, 36 Md. 73; *Hemphill v. Flynn*, 2 Pa. St. 144; *Jackson v. Salmon*, 4 Wend. 327; *Brown v. Kellar*, 32 Ill. 151, 83 Am. Dec. 258; *Crommelin v. Theiss*, 31 Ala. 412, 70 Am. Dec. 499; *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609.

These rules being settled, it sometimes becomes a very interesting question as to whether the tenant has been guilty of such a holding over as to bring him within their operation. Upon this topic there is some difference of opinion. In a case very similar to that of the principal case, a contrary rule was maintained in Michigan. In that case, *Mason v. Wierengo*, 113 Mich. 152, it appeared that the plaintiff, being the owner of a building, leased it for a term of years, at an annual rental, to Wierengo, who occupied it as a store. A short time before the expiration of the lease Wierengo rented another building and informed plaintiff that he would vacate the building owned by him at the expiration of the lease.

Preparation for removal began September 19th, and actual removal began before September 26th. Counsel for the defendant claimed that the lease expired October 1st at midnight. On September 26th, after the removal began, Wierengo was taken sick. The work of removal was continued by his clerks, but, because of his continued illness, it was not completed until October 11th. Wierengo died October 6th. Counsel for the defense claimed that the presumption of a renting for another year was rebutted by the circumstances, and that it was made impossible for Wierengo to vacate by the act of God.

In delivering the opinion of the court, Mr. Justice Hooker said: "If it is contended that the act of God excuses one from the performance of his express contract to yield possession at the expira-

tion of his lease, we are unable to acquiesce in the contention. It is only in those contracts which the act of God renders impossible of performance, as where the subject matter of the contract dies, or is destroyed, or where personal labor is contracted for, and the person dies or becomes incapacitated through the act of God, that a party is excused from performance. If, therefore, the sickness of Mr. Wierengo has any bearing upon the case, it is as a circumstance bearing upon the question of the rebuttal of the presumption. Counsel urge strenuously that the presumption of an intention to renew the lease for a year arising from a holding over is not conclusive, and that it may be rebutted. As a matter of fact, undoubtedly it may be, but it is not so clear that it would constitute a defense against the claim of the landlord who should acquiesce and elect to treat the holding over as a renewal of the lease for a year, rather than as a trespass. In the absence of qualifying circumstances implying consent to a holding over under some new arrangement, the holding over is a legal trespass, and does not depend upon the intention of the tenant. It is a wrongful holding, whatever the cause, though perhaps not culpable in a moral sense, and the rights of the landlord are definitely fixed by the law. We think that there is a uniformity in the decisions against the contention that the intention to vacate as soon as possible can affect the right of the landlord to elect to treat the holding over as a renewal of the lease for a year. It requires some express or implied consent upon his part to a holding over upon other conditions. This is wanting here. Counsel urge the hardship of the application of the rule in this case, but we cannot say that there is or is not hardship, or that we would be justified in imposing a burden upon the plaintiff to relieve the defendant from a legal obligation. He appears to have tried to rent the place, and has given defendant credit for what he has been able to derive from the building. Had Wierengo lived, he might have made the same claim if asked to pay the rent for another year, but it would not have relieved him. The situation, as it is, only differs in the degree of inconvenience, intensified as it is by the death of Wierengo, and the change in his affairs naturally resulting. It is unfortunate for his representatives that the store was not vacated, but we discover no legal reason for lifting the burden of misfortune from them, and imposing it upon another, who is in no way responsible for it": *Mason v. Wierengo*, 113 Mich. 153.

In a case where the tenant went into possession under a parol lease of a brick yard and dwelling-house for one year, with the privilege of four years at his option, and continued in possession for two years, it was held that, although the lease was void as to the four years, yet, by the entry of the tenant and his holding over after the first year, it became a lease from year to year, subject to all the terms and conditions of the verbal lease, except as to the term; and if, at the end of the second year, the tenant notifies the landlord that he intends to leave and abandons the house and re-

moves most of the brick, but leaves a portion of it in a shed which he has erected upon the premises to protect the brick from the effects of the weather, and does not remove it until some time afterward, these facts, transpiring without the consent of the landlord, operate as such a continuance of his tenancy as to enable the landlord to treat him as a tenant for another year: *Dorr v. Barney*, 12 Hun, 259. The New York cases, it seems to us, are, in principle at least, opposed to the ruling in the principal case. In the early case of *Conway v. Starkweather*, 1 Denio, 113, the rule was announced that if a tenant under a lease for a year or more, holds over after the end of the term without any new agreement with the landlord, he may, at the election of the latter, be treated either as a trespasser or as a tenant holding upon the terms of the original lease, and that distraining for rent payable after the expiration of the original lease is an election by the landlord to consider him a tenant. In this case the court said: "The tenant has no such election as that which belongs to the landlord. If he holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterward at liberty to deny that he is a tenant, if the landlord chooses to hold him to that relation. If the tenant may hold over for two weeks and then say that he is not a tenant, I see no reason why he may not give the same answer after holding over as many months or years. The plaintiff's counsel regards the holding over as only presumptive evidence of the continuance of the tenancy, which would have been sufficiently rebutted by the offer of proof that the plaintiff, before his term ended, refused to keep the property for another year, even at a reduced rent. But such are not my views. I do not think this is a case for balancing presumptions; but one where the act of the plaintiff in holding over has given the defendants a legal right to treat him as a tenant; and that it is not in his power to throw off that character, however onerous it may be": *Conway v. Starkweather*, 1 Denio, 115. In *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609, it appeared that the tenant held over for three weeks after the expiration of the lease, and then opposed the claim of the landlord to hold them as tenants for the whole year, upon the ground that they had given him notice, before the term expired, that they did not intend to keep the premises for another year, and, with his knowledge, had made arrangements to occupy other premises. Mr. Justice Earl, in delivering the opinion of the court reaffirming the decision in *Conway v. Starkweather*, 1 Denio, 113, said: "The safe and just rule I believe to be the one established by authority, that a tenant holds over the term at his peril, and the owner of the premises may treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable": *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609. Again in *Adams v. Cohoes*, 127 N. Y. 175, the court, through Potter, judge, said that: "So absolute is the implication from holding over for a few days only of a

hiring for another year, that the tenant will not be excused from the payment of rent, even where he gave the landlord notice before the end of the term that he did not intend to hire for another year, and had hired other premises which would be ready for his occupancy in a few days." In *Hayes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, it appeared that the term of the tenant expired on May first, and before that time he notified the landlord that he did not desire to renew his lease for another year. The 1st of May was a holiday and possession was retained until May 4th, the excuse being inability to get trucks to do the moving on the second day of the month, and that, on the third one of the boarders was sick and could not then be moved with safety. On the afternoon of the 4th of the month the keys to the premises were tendered to the landlord, but refused, and, in an action to recover rent, it was held that the landlord was entitled to consider the lease renewed for another year. If a tenant, after the expiration of his term, supposing there is no hurry in getting out, remains in possession of the leased premises four days after the expiration of his term, slowly removing his goods to other premises previously hired by him, which could have been removed in a much shorter time, but giving instructions to his employés to move his goods at once if the landlord or his agent asked for the key to the premises, the tenant is guilty of holding over, and the landlord may elect to treat him as a tenant upon the conditions of the first lease, although during negotiations for a new term before the expiration of the lease he has posted a notice "To Let" on the premises, and has allowed it to remain after the expiration of the term: *Shanahan v. Shanahan*, 23 Jones & S. 339.

A tenant for years who holds over only a few days may be treated as a tenant for another year, the landlord having given him notice to quit, although he has refused to renew the lease and has notified the landlord that he has rented other premises, nor is he excused by the fact that such other premises are not ready for his occupancy: *Wolfe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526. A tenant from year to year, who gives notice of his intention to terminate his tenancy at the expiration of the current year, tendering the keys of the premises to the landlord on the last day of that year, and, upon his refusal to receive them, putting them into the doors of the buildings, but who nevertheless continues for two weeks or more to use a portion of the premises for storing some of his goods previously placed thereon, and for delivering it to his customers by means of vehicles of his own, loaded at the premises, and unloaded to customers at other places, is guilty of holding over so as to subject himself, at the landlord's election, to be treated as taking the premises and becoming liable for rent at the prior contract rate for another year: *Cavanaugh v. Clinch*, 88 Ga. 610.

Although the tenant gives notice prior to the termination of his lease of his intention to vacate, if he remains in possession after the expiration of his term he becomes a tenant for another year, and liable as such under the terms of the old lease. "A tenant can-

not escape liability for the rent of another term by giving notice that he is going out at the end of his year, and then not going": *Graham v. Dempsey*, 169 Pa. St. 460.

In *Smith v. Snyder*, 168 Pa. St. 541, it appeared that the tenant, after giving notice of his intention to quit the premises at the end of his yearly term, informed the agent of the landlord that he would be willing to remain on the premises as tenant from month to month, the agent informed him that he would communicate with the landlord and let him know before the expiration of the term. This he failed to do. The tenant remained in possession for about a month over his term, when he was informed by the landlord that he would not be accepted as a tenant from month to month, and it was held that he was guilty of such a holding over as to create another tenancy from year to year.

Although the rule is everywhere recognized that if a tenant for a year or more holds over the term the landlord has the option to treat him as a trespasser, or as a tenant for another year upon the same terms as those of the original lease, some cases hold that the above rule is only a rule of presumption, which may be rebutted by proof of a different agreement or of facts inconsistent with such presumption, and that every continued occupation of the premises after the expiration of the term is not a holding over within the meaning of this rule. Thus, if, before the expiration of a lease for a year the tenant informs the landlord that he will not remain for another year, but will remain for a short period, and pay rent at the old rate for the length of time he remains in possession, and the landlord acquiesces, and thereafter receives the rent, a tenancy from year to year, or for another year, is not created: *Montgomery v. Willis*, 45 Neb. 434. And if the tenant, with the consent of the landlord, remains over only pending negotiations for a new lease, with the understanding that if a new lease is not made the tenant shall surrender the premises and not be liable for rent thereafter, he cannot be held liable for another year's rent: *Smith v. Allt*, 7 Daly, 492, 4 Abb. N. C. 205. If a tenant takes a lease of other premises from his landlord, he to take possession of them upon the expiration of his present lease, and, they not then being ready for occupancy, he surrenders his lease, but remains in possession of the old premises for a few days over his term, when, upon receiving notice from his landlord that he is regarded as holding over, he vacates them, such holding over does not raise an implied tenancy for another year, and the tenant is liable for rent only for the time he actually occupied the premises beyond his term: *Wilcox v. Raddin*, 7 Ill. App. 594. If a tenant, upon the expiration of his term, leaves furniture and other property on the premises to be used by the tenant succeeding him, under an agreement that it shall be returned at the pleasure of the outgoing tenant, the landlord cannot, after using such tenant's property for several months through succeeding tenancies, refuse to permit its removal without the payment of

a yearly rental of the premises. As there was no possession of any part of the premises by the outgoing tenant, there was no holding over by him from which a contract to pay the rent demanded could be implied: *Love v. Peirson*, 10 Daly, 272. Under the Kentucky statute, when the renting is for a year or more, to expire on a named day, the tenant may abandon the premises within ninety days next succeeding the expiration of the term, and is not liable for a longer period than he holds, unless by express contract he agrees to hold the premises for a longer time: *Mendel v. Hall*, 13 Bush, 232.

BUSH v. BOARD OF SUPERVISORS OF ORANGE COUNTY.

[159 NEW YORK, 212.]

CONSTITUTIONAL LAW—PAYMENTS TO DRAFTED MEN BY TAXATION.—A statute which empowers and directs the supervisors of several counties, upon a petition of the majority of the taxpayers, to raise by ordinary taxation the money needed to pay to any drafted man who served personally in the Civil War, or paid commutation money, or to his heirs a specified sum of money, with interest for a period of years, is void as being beyond the taxing power of the legislature, and as being in violation of a state constitution forbidding any county, city, town, or village to give any money to or in aid of any individual, or to incur any indebtedness except for county, city, town, or village purposes.

F. R. Gilbert and W. Hull, for the appellants.

W. D. Guthrie and C. A. De Gersdorff, for the respondent.

215 PER CURIAM. This was a taxpayer's action to restrain the board of supervisors from proceeding to levy a tax upon one of the towns of Orange county, in order to pay the claims of certain persons or their heirs, who were drafted into the military service of the United States, or had commuted in lieu of such service, under the act of Congress of March 3, 1863, entitled, "An act for enrolling and calling out the national forces and for other purposes." The parties seeking to enforce the claims proceeded regularly under the provisions of chapter 664 of the Laws of 1892. It will be seen that under the provisions of this statute the supervisors are directed to levy the tax in certain cases, and upon due proof that certain conditions specified have been complied with.

The courts below have sustained the action and restrained the supervisors and the authorities of the town from proceeding under the act, on the sole ground that the enactment in its entire scope and purpose is in conflict with the constitution and

therefore void. That is the only question necessary to consider upon this appeal. The statute, in substance, empowers and directs the supervisors of the several counties, upon a petition of a majority of the taxpayers, to raise by ordinary taxation the money needed to pay to any drafted man who served personally in the Civil War, or paid commutation money, or to the heirs of any such man, the sum of three hundred dollars, with the interest thereon, for a period of about thirty years.

²¹⁶ Every government must possess the inherent right or power to call upon its citizens to perform military duty in time of war. The exercise of this power involves the right of self-preservation, and that right in the government imposes upon the citizen a corresponding duty to render such services whenever the emergency arises, and it is demanded of him. The government must necessarily be the judge of the necessity for requiring the performance of this duty. This power was called into action by the act of Congress referred to, since it provided for a conscription to recruit the army. The individuals selected in the manner provided by the act were under obligations to serve, but they were permitted to commute such services, or pay, in lieu thereof to the government, a specified sum of money. The legislation which the courts below have condemned attempted to authorize taxation for the purpose of refunding to the person who paid, or his heirs, the moneys expended, with interest, and to pay to the person who personally served under the call, or to his heirs, a like sum, with interest.

The power to impose taxes, general or local, which rests with the legislature, is without much express restriction in the constitution, and yet even this power cannot be said to be absolute. On general principles, it has at least one limitation, and that is, that the money to be raised must be required for some purpose that in some sense, at least, can be said to be public. The legislature cannot authorize taxation for the purpose of making gifts, or paying gratuities to private individuals. It is quite clear that this was the purpose of the act in question. The individuals for whose benefit the tax was to be levied under the act, had no claim, legal or equitable, against the town or county where the money was to be raised by taxation. Those who actually served under the conscription only discharged their obligations to the general government. Those who commuted simply paid so much money in order to be relieved from the obligation to render military service. In either case the individual did nothing more than to discharge his obligations to the government as a

citizen and ²¹⁷ hence he had no claim against the locality to reimburse him for what he was obliged to do. The fact that a majority of the taxpayers requested the supervisors to levy the tax is of no importance. Majorities, however potent in many respects, have no power to impose taxes upon the minority for the purpose of raising money to be devoted to gifts or gratuities to individuals. We think that under the general principles which control the exercise of the power of taxation the legislature had no power to pass the act in question.

It did not attempt to authorize taxation for any public purpose, but was, in effect, a method of taking private property, not for any public use, but for the benefit of private individuals. Legislation of this character has often been questioned in the courts and quite uniformly condemned: *Taber v. Supervisors of Erie Co.*, 131 N. Y. 432; *Perkins v. Milford*, 59 Me. 315; *Moulton v. Raymond*, 60 Me. 121; *Freeland v. Hastings*, 10 Allen, 570; *Mead v. Acton*, 139 Mass. 341; *Kelly v. Marshall*, 69 Pa. St. 319; *Ferguson v. Landram*, 1 Bush, 548.

The amendments to the constitution of this state, adopted in 1874, imposed an additional limitation upon the power of the legislature to authorize taxation in counties or towns for private or local purposes. By section 10, article 8, it was enacted that no county, city, town, or village shall hereafter give any money or property to or in aid of any individual, association, or corporation. Nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, or village purposes. The statute in question provides for the imposition of the tax upon the town to raise money for the payment of claims which there was no legal or moral obligation on the part of the town to pay, and hence it is in conflict with the provision of the constitution above referred to which forbids the town from giving any money to or in aid of an individual. The action of the town authorities in auditing or recognizing the claims as obligations to be paid by taxation, or similar action by the supervisors, all of which is contemplated by the statute, also violates the restriction ²¹⁸ against incurring obligations for other than county or town purposes.

Whatever other merit these demands may have, it is quite clear that money raised to pay them by taxation on the county or town cannot, with any propriety, be said to be raised for a county or town purpose.

So we think that the courts below were right in deciding that

the statute was violative of the constitution. The judgment must, therefore, be affirmed, with costs.

All concur.

TAXATION—BOUNTIES FOR SOLDIERS—CONSTITUTIONAL LAW.—The payment of bounties to volunteers to fill quotas and avoid drafts is such a public purpose as will authorize state or municipal taxation. The bounty is not a private transaction in which the individual alone is benefited. The object is not to obtain money for the volunteer, but for the community which is to be relieved by the volunteer: *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Kunkle v. Franklin*, 13 Minn. 127, 97 Am. Dec. 226. While the legislature may authorize a town to levy a tax to raise money to pay for substitutes for drafted men, it cannot authorize such taxation to raise money to refund to individuals sums of money paid by them for substitutes: See the note to *Zigler v. Menges*, 16 Am. St. Rep. 369.

STODDARD v. LUM.

[159 NEW YORK, 265.]

CORPORATIONS — STOCKHOLDER'S LIABILITY — ENFORCEMENT OF IN ANOTHER STATE.—An assignee of an insolvent corporation of another state, appointed therein and authorized by the law thereof to maintain any suit which the corporation could have maintained, may maintain an action in another state against all the original stockholders residing therein to enforce their common-law contractual liability to pay the subscription price of their stock and to compel them to contribute their pro rata share of the indebtedness of the corporation to the extent of their unpaid stock subscriptions. This remedy exists independently of the provisions of the statute of the former state.

W. C. Ramsdale, for the appellant.

Signor & Wage and Pitts & Sherwood, for the respondents.

268 BARTLETT, J. This action is brought by the plaintiff, as the general assignee for the benefit of creditors of the Soldiers' World's Fair Hotel Association, a corporation organized under the laws of the state of Illinois, with a capital stock of \$200,000, divided into 2,000 shares of \$100 each.

The following facts, among others, appear in the complaint: The corporation became financially involved early in its history, and on the fifth day of May, 1893, executed to the plaintiff a general assignment for the benefit of creditors.

At the September, 1893, term of the Cook county court, having jurisdiction of general assignment matters, it was found that the corporation was indebted in the total sum of \$9,973.19; that the amount realized from the tangible assets was only \$795.19,

and that the assets of the corporation had been exhausted; that the stockholders were still indebted in the sum of \$36,407.15 on their stock; that it was necessary that each stockholder should be required to pay his pro rata share of the debts and liabilities.

It was then averred that these findings of the court were in fact true. The court, by order, directed the plaintiff, as assignee, to bring suit in behalf of all the creditors of the corporation against all the stockholders who had not yet paid the entire face of the stock.

It is further alleged that plaintiff, in compliance with this order, brought an action in the superior court of Cook county against the stockholders for the purpose mentioned; that up to the time of filing this complaint the suit in Illinois had realized only \$1,759.54, and that the necessary disbursements left a balance of \$326.50; that at the time the decree was entered in the Illinois suit the liabilities of the corporation amounted to \$11,670.21, and that it was necessary to recover ²⁶⁹ this sum from the stockholders in order to pay the debts of the company; that only two stockholders in the state of Illinois proved to be solvent, and that from them only \$1,039.18 was collected; that there is still unpaid to the creditors of the corporation the sum of \$10,432.70.

The complaint then sets forth the names of some fifteen or more stockholders residing in the state of New York and made defendants in this action.

It is further averred that some of the New York stockholders are solvent and some are not, but which of them are or which are not, is unknown to plaintiff; that all of the stockholders residing outside of the states of Illinois and New York are insolvent.

It is also alleged that plaintiff made a report to the Cook county court, and upon the same the court ordered that he institute a suit in the state of New York against the stockholders of the corporation residing there, to recover the amount justly due from them; that the plaintiff represents one hundred and fifteen of the creditors of the corporation, and this suit is brought on their behalf.

It is then alleged that in the suit in the superior court of Cook county, the execution of one creditor on a judgment against the corporation was returned wholly unsatisfied before the institution of that action; that the corporation has ceased doing business, being insolvent; that under the laws of the state of Illinois, a domestic corporation of that state may make

a general assignment for the benefit of its creditors, and that the assignee thereunder may maintain any suit or action that the insolvent debtor making the assignment could have maintained if such assignment had not been made.

There is annexed to the complaint a schedule marked "C," which contains portions of the statutes of the state of Illinois, dealing with the liabilities of stockholders of corporations organized under the laws of that state.

It is asked in the prayer for relief that the court determine the amount of the liabilities of each defendant resident in the state of New York, by reason of the premises, and prays the appointment ²⁷⁰ of a receiver in this state to aid him in the carrying out of the decree of the court.

The complaint was demurred to on three grounds: that it appears upon the face of the complaint the court has no jurisdiction of the subject matter of the action; that the complaint does not state facts sufficient to constitute a cause of action, that plaintiff has no legal capacity to sue.

The demurrer was overruled at special term, the trial judge holding that the action was well brought.

The appellate division reversed this interlocutory judgment with a divided court, two of the learned justices dissenting.

The point presented by the demurrer is a very narrow one, and is in substance this: that an action against these stockholders to recover a balance due on their subscriptions, or such pro rata share of it as is necessary to pay the indebtedness of the company, can only be maintained in the state of Illinois where the corporation is located, as the laws of Illinois provide a special and peculiar remedy which can be enforced only in that state.

Chapter 32 of the Revised Statutes of the state of Illinois contains the provisions involved in this controversy. Section 8, among other things, enacts that each "stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. . . . Whenever any action is brought to recover any indebtedness against a corporation, it shall be competent to proceed against any one or more stockholders at the same time, to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment." This is clearly an exclusive remedy available only in the state of Illinois.

We then come to section 25 of this chapter, which is to be read in connection with the fact that a corporation may make a general assignment for the benefit of its creditors in the state of Illinois.

271 This section provides, among other things, that if a corporation "shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suit, and each stockholder may be required to pay his pro rata share of such debts or liabilities to the extent of the unpaid portion of his stock after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders."

The balance of section 25 provides for the winding up of a corporation by a court of equity and the appointment of a receiver, et cetera. This portion of the statute is not involved in the present action.

It will thus be seen that the plaintiff in the case at bar, clothed with the ample powers of a general assignee for the benefit of creditors, is duly authorized by the first portion of this section to proceed against stockholders and all persons liable in any way for the debts of the corporation in the interest of the creditors, the corporation having ceased to do business and leaving debts unpaid.

This provision of the statute evidently authorizes the general assignee to bring an omnibus suit in the state of Illinois in the interest of creditors against stockholders and others in any way liable to contribute to the payment of the corporate debts. The statutory limitation of recovery against a stockholder to his pro rata share of the debts, if it be less than the amount unpaid upon his stock subscription, is merely stating the rule in equity when marshalling the assets.

If a stockholder of an insolvent corporation owed a balance on his stock subscription of five thousand dollars, and it was made to appear that three thousand dollars was his pro rata share of the indebtedness, judgment could only go against him for the latter amount.

The liability now sought to be enforced does not rest upon 272 the provisions of the statutes cited, but is wholly contractual and has for its foundation the principles of the common law.

We do not approve the position of appellant as set forth in the complaint and his brief, that he depends to any extent upon the Illinois statute cited in order to maintain this action.

The provisions of section 25 of the Illinois statute, above quoted, may be regarded, as far as this action is concerned, as enacting the existing rule of the common law as to the right of a creditor, or his representative, in case of insolvency, to enforce outstanding contracts, and also as putting into statutory form these equitable principles applicable to a stockholder whose unpaid subscription exceeds the pro rata amount due from him in paying the debts of the corporation.

The fact that the corporation and its general assignee for the benefit of its creditors are the creatures of the statute does not qualify the rule as stated. A corporation is a legal entity with the unlimited right to sue and be sued within the lines of its charter powers.

An examination of the principles underlying this action and those cases that are supposed to condemn it will lead to a clearer apprehension of the present situation.

The demurrer to the complaint admits that these defendants, residents of this state, are original subscribers to the stock of this Illinois corporation, and that they are still indebted for balance due on the subscription.

This is a contract liability pure and simple and one that the corporation, if solvent, could have enforced in the courts of this state. This cause of action, in the event of corporate insolvency, vests in the general assignee for the benefit of creditors, or in a receiver duly appointed.

It has been held that a right of action to enforce a personal liability of the stockholder for the debts of a corporation, given and created only by the statutes of the state of the corporation's domicile, is not enforceable in another state where the stockholder resides, upon any obligation of comity; but it has frequently been adjudged that the contract obligation assumed by subscribing to the stock of a corporation can be ²⁷³ thus enforced: *Dayton v. Borst*, 31 N. Y. 435, and cases cited.

Subscribers to the stock of a corporation incur a debt which may be enforced by any common-law or equitable remedy: *Mann v. Cooke*, 20 Conn. 178. The capital stock of a corporation is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. The creditors have a lien upon it in equity.

Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it: *Sanger v. Upton*, Assignee, 91 U. S. 56.

At pages 60 and 61 of case last cited, the United States supreme court says, in speaking of unpaid stock subscriptions: "Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation": Citing many cases.

It would speak ill for state comity if a citizen of New York could go to Illinois and in good faith subscribe to the capital stock of a corporation and later repudiate his obligation to pay a balance due on the subscription and yet not be liable to an action at law or a suit in equity in our own courts in the name of the corporation to compel him to perform his contract.

Fortunately for state comity and commercial integrity no such rule of law exists, and a creditor whose rights rest in contract may pursue his debtor into the courts of the latter's domicile. Several cases are cited as holding that this action is not maintainable, but that they are all clearly distinguishable.

In *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, a creditor of a Kansas banking corporation brought an action at law against a single stockholder, residing in this state, to enforce a liability of defendant to plaintiff created by the constitution and statutes of Kansas, which imposed upon the stockholder a ²⁷⁴ liability for the debts of the company, in addition to his unpaid subscription, in an amount equal to the stock owned by him. Judge O'Brien, in an exhaustive opinion, dealt with this general question, expressing the unanimous opinion of the court that the liability sought to be enforced was statutory and not contractual and could only be enforced in the domicile of the corporation.

It was also intimated that if the action was maintainable under any circumstances it could not be instituted at law by a single creditor against a single stockholder, but the proper remedy would be a suit in equity on behalf of all the creditors against all the stockholders.

In *Barnes v. Wheaton*, 80 Hun, 8, in which Mr. Justice Martin, now a member of this court, wrote a carefully considered opinion, there is nothing that militates against the maintenance of this action. That action was brought by the plain-

tiff for the benefit of himself and the creditors of an Ohio corporation to ascertain the pro rata share of the indebtedness of the corporation for which the defendant was severally liable and judgment was prayed for the amount.

The defendant's liability was not contractual, but imposed by the constitution of Ohio, which provided that a stockholder should be liable over and above the stock owned by him, and any amount unpaid thereon, in a further sum, at least equal in amount to such stock. It was held that this liability could only be enforced in the courts of Ohio in an action conforming to the provisions of the statute enacted to carry out the constitutional provision creating it.

In *Cleveland etc. Ry. Co. v. Kent*, 87 Hun, 329, the action was brought by the creditor of a corporation to enforce against two New York stockholders the constitutional and statutory liability existing in the state of Ohio as pointed out above in *Barnes v. Wheaton*, 80 Hun, 8. The complaint was dismissed upon demurrer and the judgment affirmed on appeal.

Returning to the case at bar, we have, in brief, this situation **275** presented under the demurrer to the complaint: This action is brought on behalf of all the creditors of the corporation, who number one hundred and fifteen or more, and is against all the original stockholders in this state, they being the only ones now liable, as all stockholders residing in states other than Illinois and New York are insolvent; the legal remedy has been exhausted against the Illinois stockholders except that a portion of the amount due from one defendant may be collected; that some of the New York stockholders are solvent and some are not, but which of them are, and which are not, is unknown to the plaintiff; that the present indebtedness of the corporation, after crediting all amounts collected from stockholders, has been ascertained in the Illinois proceedings; that under the law of Illinois a domestic corporation may make an assignment for the benefit of its creditors, and the assignee thereunder may maintain any suit or action that the insolvent company making the assignment could have maintained if such assignment had not been made.

The sole question to be determined by us at this time is whether this action can be maintained, and we are not concerned with the practical difficulties that plaintiff may encounter in establishing to the satisfaction of the trial court the just pro rata share of the defendant stockholders in the payment of the indebtedness of this insolvent corporation.

We are of opinion that this action is clearly maintainable upon principle and on authority. A subscription to the stock of a corporation creates a debt enforceable at law, or in equity, by the corporation or its legal representative: *Sagory v. Dubois*, 3 Sand. Ch. 466; *Mann v. Pentz*, 2 Sand. Ch. 257; *Herkimer etc. Co. v. Small*, 2 Hill, 127; *Troy etc. R. R. Co. v. McChesney*, 21 Wend. 296; *Mann v. Cooke*, 20 Conn. 178; *Hartford etc. R. R. Co. v. Kennedy*, 12 Conn. 499; *Hartford etc. R. R. Co. v. Boorman*, 12 Conn. 530; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593.

The receivers and assignees of individuals and corporations domiciled in another state are permitted under interstate comity to enforce the contracts of such individuals and corporations in the state of the debtor's residence.

In *Dayton v. Borst*, 31 N. Y. 435, this court held the capital stock of a New Jersey bank a trust fund for the security of its creditors and permitted the receiver of the bank, appointed in New Jersey, to recover of a New York defendant the amount remaining unpaid of his subscription to the capital stock.

In *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298, it was held that the assignee of a foreign executor may maintain an action in the courts of this state upon a chose transferred to the assignee by the executor; also that the title of the foreign executor to the assets of the estate is perfect though conferred by the law of the domicile. Judge Denio says at page 43: "Foreign corporations may become parties to contracts in this state, and may sue or be sued in our courts on contracts made here or within the jurisdiction which created them."

In *Toronto General Trust Co. v. Chicago etc. R. R. Co.*, 123 N. Y. 37, it was held that a foreign testamentary trustee, having title to the trust estate, may recover any portion thereof that has been converted, or damages for the conversion, without having the will admitted to probate here. Judge Earl pointed out that the trustee stood on his legal title and his position was to be distinguished from that of foreign executors or administrators who cannot sue here for reasons of public policy, as the courts will not aid them in the removal of the assets from this state to the possible prejudice of domestic creditors.

In the very recent case of *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, this court held, Judge Vann writing the opinion, that while a foreign receiver of a foreign corporation cannot maintain an action in this state against the corporation as sole

defendant for the sole purpose of procuring the appointment in this state of an ancillary receiver, that notes and accounts may be collected by the usual proceedings in our courts, which regard a foreign receiver as representing the original owner, and open their ²⁷⁷ doors to him as they do to a domestic receiver. The learned judge cites, at page 201, *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545, *Vanderpoel v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601, and many other cases sustaining the point now considered.

In *Mann v. Cooke*, 20 Conn. 178, a New York receiver of an insolvent corporation was permitted to sue in Connecticut for balance due on a stock subscription.

In *Cooke v. Orange*, 48 Conn. 401, the receiver of an insolvent New Jersey corporation was allowed to complete the contract of a manufacturing corporation he represented with the town defendant and afterward to sue for work and materials in the courts of Connecticut; also to attack the garnishee process sued out by the creditors of the local defendant: *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Blake Crusher Co. v. New Haven*, 46 Conn. 473.

The case at bar is not to be distinguished in principle from the authorities cited. The plaintiff, as the general assignee for the benefit of creditors of an insolvent corporation, is vested with the legal title of all its property and the power to reduce its assets to possession, and his title is perfect, though conferred by the law of the domicile: *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298.

If, as in *Dayton v. Borst*, 31 N. Y. 435, the receiver of a bank in New Jersey was allowed to come into our court and recover the amount remaining unpaid of a stock subscription, why should not this plaintiff, as a general assignee, be permitted to institute a similar action? Can it be said that there is any legal distinction to be drawn between a receiver created by the order of a foreign court and a general assignee created by a foreign legislature? The plaintiff does not come here seeking to remove assets from this state to the possible prejudice of domestic creditors, but asks that he be permitted to enforce against our own citizens the performance of contracts into which they have entered in another jurisdiction.

Public policy and state comity both require that this request should be granted.

²⁷⁸ The judgment appealed from should be reversed, that of special term affirmed, with costs, and the questions certified

answered as follows: The first question is answered in the negative; the second question is answered in the affirmative; the third question is answered in the negative.

All concur, except Gray and Martin, JJ., not voting.

CORPORATIONS—STOCKHOLDER'S LIABILITY—ENFORCEMENT IN ANOTHER STATE.—If the liability imposed by statute upon stockholders in a corporation is contractual, it may be enforced outside the limits of the state: *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835. Generally, if the liability of a stockholder is absolute and unconditional, such liability may be enforced anywhere; but if the statutory liability is penal, it is not enforceable outside the state of incorporation: See the monographic note to *Fowler v. Lamson*, 37 Am. St. Rep. 168. In Massachusetts, on the contrary, the courts will generally refuse to enforce the individual liability of a stockholder in a foreign corporation: *Bank of North America v. Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240; *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341, 59 Am. Rep. 86. But if the laws of a state provide that a stockholder is liable to judgment creditors of the corporation as upon a contract for an amount equal to the par value of the stock owned by him, which is suable anywhere, such liability may be enforced by an action brought in another state: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414. See, also, *Aldrich v. Anchor etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831.

GARVEY v. LONG ISLAND RAILROAD COMPANY.

[159 NEW YORK, 323.]

EMINENT DOMAIN.—THE LEGISLATURE CANNOT AUTHORIZE permanent and substantial injury to private property without making compensation.

RAILROAD COMPANIES—INJURY TO PRIVATE PROPERTY—COMPENSATION.—If the convenience of a railroad company requires a change in its terminal yard, so that what has been done in one part thereof with one kind of appliances without injury to private property, when done in another part with another kind, inflicts serious injury upon the buildings on adjoining land, it becomes the duty of the company to acquire the right to thus virtually use the neighboring property either by purchase or through the power of eminent domain.

RAILROAD COMPANIES—INJURY TO PRIVATE PROPERTY—NUISANCE.—A statute simply authorizing a railroad company to construct and operate a steam surface railroad does not confer power, either express or implied, to construct and use, without making compensation, a turntable in its terminal yard in the immediate vicinity of dwelling-houses on private property, so as to seriously, continuously, and permanently injure such premises and impair their enjoyment. Such construction and use of a turntable is a nuisance which may be enjoined.

TRESPASS—INJUNCTION AGAINST.—If strong and aggravated instances of continuing trespass are shown, which must

necessarily result in substantial damages to plaintiff's property that are in no way offset by benefits, a permanent injunction may be issued, although the amount of damages is not fixed.

Action to recover damages sustained by plaintiff as the owner of a dwelling-house in the city of Brooklyn, on account of a continuous nuisance committed by the defendant, a railroad company, upon its premises immediately in the rear of those of the plaintiff, and to restrain the further commission thereof. The nuisance, as described in the complaint, consisted in the fact that, "locomotives enter, move about in, and leave the yard to the number, during the summer, of about two hundred daily, each making its characteristic noises, such as the hissing and pounding of escaping steam, the rumble of wheels, the clatter of irons, the clanging of bells, and other irritating noises. Each locomotive which enters the yard is run upon a turntable constructed in the immediate rear of plaintiff's house, making a noise as it goes on like an explosion, and shaking and jarring plaintiff's house. Steam, smoke, cinders, ashes, and noxious and unwholesome gases are set free in the defendant's yard, and cast upon the plaintiff's premises and into the plaintiff's doors and windows." The defendant company claimed that the acts complained of were done by it "lawfully, carefully, and for the purposes of its incorporation only." Judgment for the plaintiff, and the defendant appealed.

A. A. Gardner, for the appellant.

G. S. Billings, for the respondent.

328 VANN, J. From the evidence appearing in the record, especially when it is amplified by the view of the premises taken by the trial judge at the request of both parties, and from the nature of the findings, which have the effect of a general verdict for the plaintiff, we are compelled to assume, after affirmance by the appellate division, the existence of a nuisance upon the defendant's premises that seriously injures the premises of the plaintiff: *Amherst College v. Ritch*, 151 N. Y. 282, 320.

It is claimed that the judgment below cannot be sustained because no property right of the plaintiff was invaded, inasmuch as the defendant had authority for what it did in the statute which created it. That statute conferred no unusual power upon the defendant, but simply authorized it to construct and operate a steam surface railroad. It did not authorize it to construct this particular turntable, or to maintain this

particular yard, or to concentrate the particular evils of its terminal station in the immediate vicinity of inhabited dwellings. The implied powers springing from the express power to maintain a railroad do not extend to the grievances complained of by the plaintiff nor permit the ruin of his property without compensation. While the welfare of the public and the necessities of travel require that the plaintiff should submit to annoyances caused by a reasonable use of the property of the defendant, he is not obliged to submit to those caused by an unreasonable use, all the circumstances being taken into account. Slight injuries and annoyances to people living along the line of a railroad are a necessary incident to its maintenance and operation, but when the company ³²⁹ does, even upon its own land, such acts as seriously impair the enjoyment of the adjoining land, to a certain extent it takes such land and must discontinue the practice or make compensation: *Pumpelly v. Green Bay Co.*, 13 Wall. 166. "The legislature may authorize small nuisances without compensation, but not great ones": *Bacon v. Boston*, 154 Mass. 100. As the legislature cannot authorize the total destruction of private property without making compensation, so it cannot authorize permanent and substantial injury to such property without making compensation, and it did not assume to do so in the statute upon which the defendant relies. If the convenience of the defendant required a change in its terminal yard, so that what had been done in one part thereof with one kind of appliances without injury to private property, when done in another part with another kind, inflicted serious injury upon the buildings on adjoining land, it became its duty to acquire the right to thus virtually use the neighboring property, either by purchase or through the power of eminent domain. It could not so conduct its business as to crack the walls and ceilings of adjoining houses, awaken people from their sleep by shaking their beds, smoke them out of their rooms, or injure their personal property kept on the premises by casting dust, ashes, and cinders upon them, and appeal to the statute for protection. "Where the legislature authorizes a thing to be done which can fairly be accomplished without causing a nuisance, it will be assumed that the legislature intends that it shall be done in that way": *Randolph on Eminent Domain*, sec. 140. The statute does not authorize acts that amount to a partial appropriation of property without requiring payment. The injuries complained of are not the natural or unavoidable result of the exercise of the statutory authority,

and are outside of the line of legislative protection. Thus, an engine-house, although a necessary incident to the operation of a railroad, when so used as to cause smoke, soot, cinders, and coal dust to necessarily damage a dwelling-house erected upon an adjoining lot, was held a nuisance, and not within legislative sanction, and an action to recover damages and restrain ³³⁰ the nuisance was upheld: *Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701. It was further held in that case that where the terms of a statute giving authority to the corporation are not imperative but permissive, it does not confer license to commit a nuisance, although what is contemplated by the statute cannot be done without it.

So when general authority had been conferred upon a municipal corporation to build a pumping station as a part of an extensive system to supply a city with water, but leaving the site to the selection of the corporation, it was held not to confer power, either express or implied, to construct it so near the lands of another as to seriously affect the houses, subsequently built thereon, through the vibrations and noise of machinery: *Morton v. Mayor etc.*, 140 N. Y. 207. In that case the court said: "The legislature undoubtedly authorized the defendant to construct a building, and to place in it the necessary machinery to accomplish the purpose in view. But that is not the act complained of, or which produced the injury to the plaintiff's property. The wrong consisted in placing the building and machinery so near the adjoining property as to injuriously affect it by the noise and vibration. The city has a right to build upon its own land, but there was nothing in the statute that required it to place the structure where it did. It could perform every duty imposed by the statute by building the pumping station at such distance from the adjoining houses as to avoid the results of which the plaintiff justly complains. If it was not possible or practicable to do that upon the land that the defendant owned, then more could have been acquired for the purpose."

The use by the defendant of its property to the injury of the plaintiff was not temporary, for the purpose of adapting it to its business, but regular, continuous, and in the nature of a partial but permanent appropriation. The distinction between a permanent invasion of land and a temporary annoyance, as by blasting, was carefully pointed out in *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 279, 37 Am. St. Rep. 552.

When the odor from gasworks was found to so pollute the

³³¹ air as to substantially render the plaintiff's property unfit for comfortable enjoyment, it was held to be a nuisance, although the acts complained of were inseparably connected with the carrying on of the business itself, and that it was not essential to a right of action that the owner should be driven from his dwelling: *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18.

In *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 328, the court said: "Plainly the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. . . . That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. . . . It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine-house and repair shop in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine-house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit. . . . The authority of the company to construct such works, as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the president's house or of the capitol, or in the most densely populated locality. . . . Whatever the extent of the authority conferred, it was accompanied with ³³² this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property."

We close the discussion of the point under consideration by repeating the language of Judge Finch in *Hill v. Mayor etc.*, 139 N. Y. 495, 505: "Obviously, the general doctrine which levies upon individuals forced contributions for the benefit of

the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated sometimes by construing the harm inflicted into a taking of private property for which compensation must be made, and sometimes by a rigid construction of the authority claimed. Both methods indicate a lurking doubt of the equity of the general doctrine and a disposition to narrow the field of its operation."

The defendant insists that its appeal should be sustained because the trial court awarded no past damages to the plaintiff.

A court of equity has jurisdiction of an action to restrain the commission of a continuing trespass, because the injunction prevents a multiplicity of actions at law, which is a grievance to the parties and a burden upon the public: *Corning v. Troy Iron etc. Factory*, 40 N. Y. 191; *Williams v. New York etc. R. R. Co.*, 16 N. Y. 97, 111; 69 Am. Dec. 651; *Henderson v. New York Cent. R. R. Co.*, 78 N. Y. 423.

While in such an action the court may also render judgment for the damages already sustained, that relief is merely incidental and is not an essential part of the main cause of action for a permanent injunction. The party entitled to damages may waive them, if he chooses, by not furnishing evidence to enable the court to measure them in money, which is an advantage to the defendant, but does not defeat the action. If such substantial and continuous interference with the ordinary enjoyment of property is shown as would, when properly measured by evidence, enable the court to fix the amount of the damages, the injunction may be issued, although no damages are awarded. The extent of the injury is important, ³³³ but whether the amount is admeasured in dollars and cents is unimportant, unless there are benefits to be offset against the damages.

When, as in certain actions against elevated railroads, a wrongful appropriation of easements appurtenant to abutting property appears, but it also appears that the presence of the road has so increased the value of the property that the actual damages are only nominal, relief by way of injunction may be refused because the trespass is but technical and the real injury unsubstantial: *O'Reilly v. New York Elevated R. R. Co.*, 148 N. Y. 347. This is upon the ground that a court of equity "is not bound to issue an injunction when it will produce great public or private mischief merely for the purpose of protecting a technical or unsubstantial right": *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499, 509.

This is not such a case, but one where the trespass was permanent, continuing, and grievous, and went to destroy the value of the property of the owner with no compensating advantages. The decision of the trial justice established the plaintiff's right, the existence of the nuisance and its injurious effect upon his property. The case was thus brought within the sound discretion of the court, and after united action by the courts below, we cannot interfere. The theory is not tolerable that, although one party to an action may be gradually demolishing the house of the other, the latter cannot have an injunction to prevent its total destruction, because the amount of the damages already sustained has not been admeasured in money.

Our conclusion is, that where strong and aggravated instances of continuing trespass are shown, which must necessarily result in substantial damages to the plaintiff's property that are in no way offset by benefits, a permanent injunction may be issued, although the amount of the damages is not fixed.

The judgment should be affirmed, with costs.

All concur, except Parker, C. J., and Haight, J., not voting.

EMINENT DOMAIN.—THE LEGISLATURE CANNOT, in the exercise of the police power, take private property for a public use without compensation, when such property can be condemned and paid for under the power of eminent domain: *People v. Elk River etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125; *Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771, and note.

RAILROADS—SPECIAL DAMAGES TO PRIVATE PROPERTY—INJUNCTION.—Where a railroad company has obtained a deed to a right of way under representations that it is to be used for main line purposes alone, and it is afterward used for sidetracks, such use will not be enjoined. The grantor is, however, entitled to recover damages for the injury sustained in excess of those which arise from the proper use of the principal line of the road: *Donisthorpe v. Fremont etc. R. R. Co.*, 30 Neb. 142, 27 Am. St. Rep. 387. Where a statute authorizes a railroad company to take property for the purpose of running and operating its road, it may take property for depot purposes: *Matter of New York etc. R. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

TRESPASS—INJUNCTION AGAINST.—A trespass of an ordinary character will not be enjoined. But where a trespass, or a series of trespasses, operate in effect to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction: *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342. See, also, *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828. Injunctions in cases of trespass were not granted under ancient doctrines of the court of chancery. Parties were left to their legal remedy; but the more liberal practice now prevails of allowing them where the trespass presents a case of destruction or irreparable mischief: *Burnley v. Cook*, 13 Tex. 586, 65 Am. Dec. 79, and note; *Scudder v. Trenfon etc. Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756.

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[159 NEW YORK, 346.]

HOMICIDE—SELF-DEFENSE.—Before one can justify the taking of human life in self-defense he must show that there was reasonable ground for believing that he was in great peril, that the killing was necessary for his escape, and that no other safe means was open to him. When one believes himself about to be attacked by another, and to receive great bodily harm, it is his duty to avoid the attack, if in his power to do so; and the right of attack for the purpose of self-defense does not arise until he has done everything in his power to avoid its necessity.

HOMICIDE—MURDER—SUFFICIENCY OF EVIDENCE.—If the evidence shows that, after an encounter between the deceased and the defendant, the latter obtained a knife in a spirit of revenge, and, after being warned not to return, did return with intent to kill the deceased, and thereupon killed him, the jury is justified in finding that the killing was done with premeditation and deliberation, and that the defendant is guilty of murder in the first degree.

HOMICIDE—MURDER IN FIRST DEGREE.—A deliberate and premeditated intention to kill, followed by the killing of a human being, completes the crime of murder in the first degree.

HOMICIDE—MURDER—SUFFICIENCY OF PROOF.—If the proof justifies a jury in finding that the homicide was intentional and resulted from sufficient deliberation and premeditation to warrant a verdict of murder in the first degree, the appellate court will not interfere with the determination upon the facts.

HOMICIDE—MURDER—MOTIVE.—Evidence showing that there had been a personal encounter between the deceased and the defendant, and that the latter, humiliated by his defeat and inspired by a spirit of revenge, returned to the place of the first affray and made a second attack, which was fatal, is sufficient to justify the jury in finding that the defendant had a motive for the commission of the crime.

HOMICIDE—MURDER—REVIEW OF EVIDENCE.—It is not within the province of the appellate court, in reviewing a judgment of death, to review or determine controverted questions of fact arising upon conflicting evidence. The jury is the ultimate tribunal in such cases, and with its decision the appellate court may not interfere, unless it reaches the conclusion that justice has not been done.

CRIMINAL LAW—CONFESSIONS.—TEST OF ADMISSIBILITY of the statement of a person accused of crime, whether made in the course of judicial proceedings or not, is whether it is made voluntarily, and that must be determined by its nature and the circumstances under which it is made.

CRIMINAL LAW—CONFESSIONS—ADMISSIBILITY OF VOLUNTARY STATEMENTS.—Voluntary statements made by a man of ordinary intelligence and education to police officers after his arrest, not as evidence nor as the result of an examination in a judicial proceeding, although reduced to writing and verified by him, are admissible in evidence on the trial of the crime for which he was arrested, if not induced by any promise, threat, or improper influence, although he was not informed by those to whom he made the statements that they might be used against him on his subsequent trial.

CRIMINAL LAW — CONFESSIONS IMPROPERLY OBTAINED—ADMISSIBILITY.—If peace officers, by covert threats, doubtful and uncertain promises, acts of intimidation, or other questionable means, procure incriminating statements from persons under arrest, and subsequently charged with crime, they are inadmissible against them.

H. L. Taylor and H. D. Fitzgerald, for the appellant.

T. Penney, for the respondent.

348 MARTIN, J. That upon the ninth day of October, 1898, the defendant killed John Hummings by stabbing him with a dirk or claspknife was plainly established and not denied. The only question litigated upon the trial was whether the homicide was committed under such circumstances as to constitute a crime, or whether it was justifiable. The claim of the defendant was that he was attacked by the decedent, and that he killed him in the lawful defense of his own person. Upon that issue the jury found against him.

Before a party can justify the taking of life in self-defense, **349** he must show that there was reasonable ground for believing he was in great peril; that the killing was necessary for his escape, and that no other safe means was open to him. When one believes himself about to be attacked by another, and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right of attack for the purpose of self-defense does not arise until he has done everything in his power to avoid its necessity: *People v. Constantino*, 153 N. Y. 24; *People v. Johnson*, 139 N. Y. 358, 363; *People v. Carlton*, 115 N. Y. 618, 623; *People v. Sullivan*, 7 N. Y. 396. Applying these rules to the proof in this case, it is evident that the defendant's claim that the homicide was committed in his own defense cannot be sustained, as it was, under the evidence, at least a question of fact, and the finding of the jury is conclusive.

The first point presented by the learned counsel for the defendant in his brief is that the evidence was insufficient to justify the jury in finding the defendant guilty of murder in the first degree, because it failed to show any intent on the part of the defendant to kill the decedent, or that the act was performed with the premeditation and deliberation required to constitute that crime. Hence, a brief epitome of the facts and circumstances disclosed by the evidence seems necessary to the proper consideration of that question.

The record discloses that the defendant is a colored man, who,

at the time of the homicide, was living at No. 167 Elm street, in the city of Buffalo. He was then twenty-seven or twenty-eight years of age, a waiter by occupation, although he had not been steadily employed for some months anterior to that time. Between 8 and 9 o'clock on Sunday morning, the day of the homicide, the defendant and a friend, Reese Augustus, were engaged to some extent in drinking together. They then went to several places in the neighborhood where they resided, and on their way each stopped at a laundry to obtain his linen that had been left there. They then returned to the rooms they occupied on Elm street, after which they had two more drinks of whisky, and at ³⁵⁰ about 10 o'clock the defendant left to take a walk in the neighborhood. After walking about two blocks he met Nellie Davis, a colored woman of his acquaintance, who was on her way to a room or tenement known as No. 13 Gay street, occupied by one Minnie Lewis. After a short conversation between the defendant and Nellie, the latter entered No. 13, and was followed by the defendant. In the room which they entered there were the decedent and Minnie Lewis, who were in bed together, a woman whose real name was Fannie Truss, William Harris, Spencer Quarrells, and Robert Green, all of whom were colored. While there a dispute arose between the defendant and one of the women, whereupon Minnie Lewis asked him to leave and attempted to force him to do so. A quarrel ensued and he left the house, but picked up a bottle and returned to the doorway. The decedent then arose from the bed, put on a pair of trousers and came to the door, whereupon a fight between him and the defendant commenced and continued until some one called the police, when they separated. During the encounter, the defendant struck the decedent with the bottle, causing a slight wound upon his head. Although neither party was seriously injured, the advantage of the contest seems to have rested with the decedent. When the parties separated, the defendant went into Cotton's saloon, and from there to Gay street, then down Michigan to Vine street, and then to his room on Elm street. While there he changed his clothing, and soon after returned to Gay street, where the affray occurred. While returning he was warned not to go to the house where the fight took place. He, however, disregarded the warning, continued his course, and entered the room occupied by Minnie Lewis, where he found the decedent upon the bed, with Minnie Lewis sitting by his side, and Fannie Truss, bathing his head with witch hazel. When the defendant entered the deco-

dent arose, and another struggle followed. During the last encounter the defendant drew a long dirk or claspknife he then had, and struck the decedent repeatedly with it, inflicting several severe wounds, ³⁵¹ which caused his immediate death. The defendant then left the house, wringing the blood from his hands, went to a saloon on the corner of Elm and Church streets, where, while he was washing, he was arrested. The knife with which he stabbed the decedent was left in his body. A wound was found upon the decedent's neck four inches in length, which severed several arteries, and which was of itself fatal. The defendant's knife and hat were found near the body. He admitted having killed the decedent, but claimed that when he returned to Gay street he was in search of Nellie Davis; that he opened the door and asked for her, whereupon the decedent jumped from the bed, declared that he would fix the defendant this time, and struck at him, and that thereupon they clinched, and the decedent attempted to strike him with a piece of iron, when he drew his knife, struck blindly at him, and thus inflicted the wounds which caused the decedent's death. Upon this evidence the defendant based his claim that he acted only in self-defense.

The testimony of the witnesses called by the people was to the effect that the defendant entered the room with a rush, inquired for the decedent in indecent terms, whereupon the parties clinched, and very soon the defendant pushed the decedent from him, when the latter staggered and fell to the floor, the blood spurting on to the defendant, and the decedent soon expired.

After the homicide, no marks of the struggle were found upon the body of the defendant, except a slight scratch between the thumb and index finger of his left hand. The knife with which the decedent was slain belonged to Reese Augustus, from whom the defendant borrowed it that day. Whether he obtained it before the first encounter, or afterward, does not clearly appear from the record. The evidence upon the part of the people tended to show that it was procured after the first encounter, while the defendant claimed that it was obtained before that time and for a legitimate purpose. We think the testimony was sufficient to warrant the jury in finding that it was procured after his first difficulty ³⁵² with the decedent. Under the evidence given upon the trial, it is quite obvious that whether the homicide was perpetrated under such circumstances as to con-

stitute the crime of murder in the first degree was a question of fact for the jury.

There was abundant evidence to justify the jury in finding that after the first encounter, the defendant, in a spirit of revenge arising from chagrin or anger at his defeat, went to the room of his friend, obtained the knife, and returned, intending to kill the decedent. If, however, it be said that it is uncertain whether he obtained the knife at that time, or had obtained it previously for another purpose, still it is not very material, as in either event he had abundant opportunity between the first occurrence and the time of the homicide to form a premeditated and deliberate intent to commit the crime of which he was convicted.

Moreover, he was cautioned by parties to whom he was known not to return, thus showing that it was evident to them that he was returning for the purpose of renewing his contest with the decedent. The facts and circumstances bearing upon this question were abundantly sufficient to justify the jury in finding that the defendant not only intended to kill the decedent, but that it was done with premeditation and deliberation.

The court has so often stated the rule as to the intent, premeditation, and deliberation necessary to constitute the crime of murder in the first degree, that it seems unnecessary to restate it at this time. If there was an intention to kill, which was deliberate and premeditated, and the killing followed, the crime was complete: *People v. Majone*, 91 N. Y. 211; *Leighton v. People*, 88 N. Y. 117; *People v. Beckwith*, 103 N. Y. 364; *People v. Conroy*, 97 N. Y. 76; *People v. Hawkins*, 109 N. Y. 408; *People v. Johnson*, 139 N. Y. 358; *People v. Constantino*, 153 N. Y. 24, 37; *People v. Decker*, 157 N. Y. 194.

Where the proof justifies a jury in finding that the homicide was intentional, and resulted from sufficient deliberation and premeditation to warrant a verdict of murder in the first ³⁵³ degree, this court will not interfere with the determination of the jury upon the facts: *People v. Sutherland*, 154 N. Y. 345. The proof in this case was such as to justify the verdict, and, consequently, under the principle of its former decisions, this court should not interfere upon the ground discussed.

The defendant also claims that the charge of the trial judge was not impartial, but was highly prejudicial to him. We have examined the entire charge, but find in it nothing which would justify us in disturbing the judgment below, or which requires

special discussion. The charge, when taken together, was fair, impartial, and correct, both as to the law and facts, and was as favorable to the defendant as he was entitled to under the evidence. Under such circumstances, it is manifest that the defendant's claim in this respect cannot be upheld (*People v. Constantino*, 153 N. Y. 24), and that the judgment cannot be reversed on that ground. Moreover, we find no exceptions to the charge, and, consequently, no question of law is presented for our determination.

The next ground of the defendant's appeal is that the evidence or motive was insufficient to justify the jury in finding him guilty of the crime charged. We think this claim cannot be sustained. Although it may be conceded that evidence of motive had an important bearing upon the question of the defendant's guilt, yet the claim that no motive was proved does not seem to be justified. There had been a personal encounter between the defendant and decedent, in which the former had been practically defeated, and the jury may well have found that, humiliated by his defeat and inspired by a spirit of revenge, he returned to the place of the first affray and made a second attack. One of the usual incentives to the commission of crime is the desire of revenging real or fancied wrongs. We think the evidence was sufficient to justify the jury in finding that the defendant had a motive for the commission of this offense.

The defendant also asks this court to grant a new trial ³⁵⁴ under the provisions of section 528 of the Code of Criminal Procedure, which provides that when the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below. This section has often been considered by this court, and it has uniformly held that it is not its province to review or determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such cases, and with its decision this court may not interfere, unless it reaches the conclusion that justice has not been done. We are unable to reach any such conclusion in this case, and, hence, must decline to interfere upon that ground.

The only other question raised by the defendant arises upon his exceptions to the admission of statements previously made by him, which were permitted to be proved upon the trial. After his arrest he was taken to a police station, and in the

afternoon of the day of the tragedy he was shown the knife with which the decedent was killed, and asked by Sergeant Holmlund if it was his, to which he replied it was. He was also shown the hat found near the decedent's prostrate body, and asked if it belonged to him, to which he answered in the affirmative. He was then taken upstairs to the police headquarters, where he was questioned and his statements written out by a typewriter, signed by him, and verified by his affidavit. Upon the next day he was again interrogated in regard to the transaction, his answers were taken, committed to paper by a typewriter, signed by the defendant and verified. These confessions substantially correspond with the testimony which was given upon the trial, except as to the manner in which he obtained the knife with which the homicide was committed.

When the defendant was upon the stand as a witness in his own behalf, he was cross-examined by the district attorney as to certain claimed discrepancies between the written statements signed and verified by him, and his testimony given upon the ³⁵⁵ direct examination. His verified statements were also offered and admitted in evidence under his objections: "1. That it is incompetent and improper, and was improperly and involuntarily obtained; that this defendant was in a state of great mental disturbance and nervousness at this time, and was not competent to give a statement voluntarily, 2. Under section 395 of the Code of Criminal Procedure, that this alleged statement was made neither in the course of a judicial proceeding, nor to a private person; 3. That section 395 of the Criminal Code is unconstitutional in that it deprives this accused, or any accused, of his rights, and unreasonably and unlawfully restricts them under section 6 of article 1 of the state of New York, and the fifth amendment to the United States constitution, which declares that no man shall be compelled to give testimony against himself in a criminal case." These objections were overruled and an exception taken.

The defendant's testimony as to what occurred when these statements were made was in substance that he was taken upstairs into a large room where a gentleman sat at the table with his back to the window, and had a chair in front of him in which the defendant sat; that one Haller was there; that Holmlund sat by a window, and that a typewriter or stenographer was there, who commenced asking him questions, and that Holmlund, during the second interview, said to him that he could just as well tell him the truth, as it would save him

(Holmlund) a lot of trouble; besides that, he could get twenty people who saw the defendant run across Michigan street to get his knife. He then testified that they questioned him until he supposed they got what they wanted, and added: "I was glad to tell them everything, because I had been bothered by people coming downstairs." He was then asked: "What do you mean by that? A. After I got there, news was brought to me I had killed a man. Of course, I didn't feel good about that. I didn't have any intention of killing anybody, and I was put in my cell, and didn't have anything on besides a pair of pants and shoes, and I tried to sleep; and, every time I laid down, there was some one to see me on some ³⁵⁰ pretense or other. If I was laying down, they couldn't see my face, and they would make a noise and rouse me and want to know how did I do it, and all that kind of business. They kept me that way all that day, Sunday and Sunday night, Monday, and partly Monday night." Assuming the correctness of the defendant's testimony as to what transpired when his statements were made, the question is presented whether they were properly permitted to be used as evidence against him.

Although a difference has always existed between the civil and the common law in regard to confessions made by persons charged with crime, the former regarding them as well-nigh conclusive, while the latter treats that species of evidence as open to distrust, still, as the latter has been adopted by the courts of this state, it is only the common law and statutes that need be considered in determining their bearing upon the question of the admissibility of the defendant's confessions in this case.

The first case in this court, called to our attention, where the question has arisen, is *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721. In that case, Parker, J., said: "The general rule is, that all a party has said which is relevant to the questions involved in the trial is admissible in evidence against him. The exception to this rule are where the confession has been drawn from the prisoner by means of a threat or a promise, or where it is not voluntary, because obtained compulsorily or by improper influence." There the defendant was on trial for murder, and it was held that his statements as a witness at the coroner's inquest, made before he had been charged with the crime and before it was ascertained that a crime had been committed, was admissible in evidence against him.

In *People v. McMahon*, 15 N. Y. 384, where the defendant was arrested by a constable without a warrant, on suspicion of having murdered his wife, and was taken before the coroner who was holding an inquest, and was sworn and examined as a witness, it was held that the evidence thus given was not admissible on the prisoner's trial for the murder.

³⁵⁷ *People v. Wentz*, 37 N. Y. 303, is to the effect that the confessions of a prisoner voluntarily made are admissible as evidence against him, although made to a policeman while the prisoner was not in his custody, although arrested and confined in jail.

In *Teachout v. People*, 41 N. Y. 7, it was decided that the statements made by a prisoner under oath at a coroner's inquest were admissible against him upon his trial for murder, although he knew, at the time he was sworn, that the decedent was poisoned, that he would probably be arrested for the crime, was informed that rumors implicated him, and that he had a right to refuse to testify.

In *Murphy v. People*, 63 N. Y. 590, after the prisoner's arrest and commitment to jail, he was brought to the sheriff's office and made certain statements, as to which the witness was permitted to testify under objection. It appeared that the prisoner was asked by the officer making the arrest if he desired to make any statement as to his whereabouts on the day of the murder; the witness replied he did, and then made the statement testified to. It was offered in evidence on his trial, and it was held by this court that the statement was voluntary, the reception thereof did not constitute error, and that a statement made by a prisoner is not involuntary because made after his arrest and while in the custody of the officer arresting him.

Cox v. People, 80 N. Y. 500, is to the effect that evidence of confessions made by a prisoner, after his arrest, to the police officer making it, when not induced by any promise or threat, and voluntary upon his part, is competent, and that it is not sufficient to exclude a confession that the prisoner was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put by him.

In *People v. McGloin*, 91 N. Y. 241, a statement or confession made by the prisoner was offered in evidence on the part of the prosecution. He was arrested by an inspector of police in the city of New York, who informed him of the crime for which he was arrested, that he was an inspector of ³⁵⁸ police, had been watching him since the homicide, told him of his hav-

ing tried to steal a barrel of whisky the night before, and about pledging his pistol with which the murder was supposed to have been committed, whereupon the prisoner said that he would make a statement. A coroner was sent for, who came to police headquarters where the prisoner was in custody, and a confession was made in the presence of the coroner, who acted as clerk to take it down and prove it. It was there held that as the evidence did not disclose any threat, nor authorize an inference that the confession was made under any influence of fear, it was not a compulsory statement and was properly received in evidence, although sworn to by the accused.

In *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, the defendant, who was an ignorant Italian, unfamiliar with the English language, was arrested, without warrant, as a suspected murderer. While under arrest, he was taken before a coroner's inquest, and, after proof of the homicide, was examined, on oath, by the district attorney and the coroner as to circumstances tending to connect him with the crime. It did not appear that he was informed that he was not bound to answer questions tending to criminate himself. On his trial for the commission of the crime the prosecution was permitted to prove, under objection and exception, the statements so made by the prisoner. This was held error upon the ground that the evidence sought to be excluded was not a confession, but an official examination on oath of the prisoner while in custody. Still, in that case the doctrine of the *Hendrickson*, *McMahon*, and *Teachout* cases was considered and practically reaffirmed.

The question again arose in *People v. Chapleau*, 121 N. Y. 266, where it was held that since the adoption of section 395 of the Code of Criminal Procedure, the test of admissibility of the statement of a party accused of crime, whether made in the course of judicial proceedings or not, is whether it was voluntarily made, and that is to be determined by its nature and the circumstances under which it was made. It was also held that it is no ground for the exclusion of an admission by a prisoner charged with crime that it was made while he was under arrest, if shown to have been made voluntarily and without influences of promises or threats. In that case the statement was made before a coroner after the defendant was informed as to his right to depose or not, and that the deposition might be used against him. He was then sworn and made a statement, but upon the following day denied having made it, and refused to

sign it. It was, however, received in evidence and held admissible.

In *People v. Wright*, 136 N. Y. 625, 632, it was held that, under the recent decisions of this court, there was no error in proving the defendant's declarations when examined before the coroner. This conclusion seems to have rested upon the *Chapleau* case and the cases cited in the opinion therein.

In *People v. Cassidy*, 133 N. Y. 612, confessions by the defendant were made, while he was under arrest to Inspector Byrnes of the New York police force. The inspector and others present testified that the confessions were voluntary. The defendant testified that they were made under the influence of fear produced by threats. The question whether they were voluntary and reliable was submitted to the jury by the court, which found against the defendant, and it was held that they were properly in the case and sufficient to justify the verdict.

In *People v. McCallam*, 3 N. Y. Crim. Rep. 189, after the defendant knew she was suspected of the crime for which she was tried, she was told by an officer that they had found enough to convict her and she might as well own up, it was held that this declaration did not constitute a threat, and that the confession of the defendant was voluntary and admissible: *People v. Mackinder*, 80 Hun, 40.

If the defendant supposed there was any conflict in the evidence as to the circumstances under which his statements were made, or as to whether they were voluntary or otherwise, he should have requested the submission of that question to the jury. No such request was made. We think, as the defendant's counsel evidently did upon the trial, that no such ³⁶⁰ conflict existed, and the question whether the statements were voluntary and admissible under the provisions of section 395 was for the court and not for the jury.

When we test the question as it arises in this case by the authorities cited, it becomes quite manifest that the defendant's exceptions were not well taken. Obviously, his statements were admissible under the provisions of section 395, as there can be no pretense or claim that they were made while the defendant was under the influence of fear produced by threats, or upon any stipulation by the district attorney that he should not be prosecuted therefor. Moreover, there was no evidence that the statements were in any degree compulsory, or that they were induced by any improper influence whatsoever. While it is true that the defendant was under arrest when they were made,

still, they were not the result of an examination in any judicial proceeding. Nor could he have supposed that he was required to make any statement whatever, except such as was entirely voluntary upon his part. It is true he was not informed by those interrogating him that what he said might be used against him upon a subsequent trial, still, he must have understood such to have been the case, as he was a man of ordinary intelligence and education. Indeed, if we adopt his own version of the circumstances under which his statements were made, we find nothing in the nature of compulsion or improper influences, or of a promise or threat by which they were induced. At the second interview, Holmlund said to the defendant that he could just as well tell the truth, as it would save him (Holmlund) a lot of trouble, and, besides, he could get twenty people who saw him run across Michigan street to get it, evidently referring to the knife. This falls far short of constituting compulsion or improper influences, or a threat or promise to the defendant. There was in this statement nothing from which such a conclusion could be drawn. Besides, the defendant, in substance, testified that he was glad to tell the officers everything, because he had been bothered by the people, then explaining why he was glad to give the ³⁶¹ officers the information he did. Thus, it is manifest that these statements were purely voluntary, and procured by no means which would justify a determination that they were involuntary, and, consequently, inadmissible.

This case is clearly distinguishable from the case of *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, and other kindred cases upon which the defendant relies. In those cases the confessions or statements were obtained in a proceeding of a judicial character, or where the defendant may well have understood that he was required to testify and was not instructed as to his right to decline an answer, or that his statements might be used against him. Here they were statements made to the officers having him in charge, were not given as evidence, but were voluntary, and, although reduced to writing, signed by him and verified, amounted at most to a mere admission upon his part.

Under these circumstances, his statements, and the evidence as to what he said, were, we think, clearly admissible under the principle of the authorities to which we have referred.

While cases will doubtless arise in the future, as they have in the past, where public officers, by inquisitorial and compulsory examination, may obtain from persons suspected of or charged

with crime, statements which it would be error to admit in evidence against them, still this is not such a case, as there was no proof that the defendant's statements were other than voluntary, and made with a full understanding of his situation and an exact comprehension of his rights. The proof is quite to the contrary. In passing, it may be proper to observe that, when officers charged with the enforcement of the law, through undue zeal or an inordinate desire to obtain evidence to convict by covert threats, doubtful and uncertain promises, acts of intimidation, or other questionable means, procure incriminating statements from persons subsequently charged with crime, they are inadmissible, as they would be regarded as involuntary and not made without inducement or practical compulsion. The reception in evidence of statements thus obtained might well be a ground for reversal. Therefore, district attorneys and other executive ³⁰² and administrative officers should remember that to be admissible statements made by one charged with or suspected of crime must be voluntary, fairly obtained, and not procured by inquisitorial compulsion or other improper means. When properly procured they may be of value and employed as evidence against the person making them, but if procured otherwise they are not admissible, and a judgment influenced by such evidence would require reversal.

Having thus examined all the exceptions to which our attention has been called by the defendant, and finding none which would justify a reversal, it follows that the judgment should be affirmed.

All concur (Bartlett, J., in result).

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.—Life may be lawfully taken in self-defense, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him: *Commonwealth v. Breyessee*, 160 Pa. St. 451, 40 Am. St. Rep. 729. The accused must honestly believe, without fault or carelessness on his part, that the danger is thus urgent: *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20. One who provokes a difficulty, and by his own wrong contributes to a situation out of which arises a necessity to take the life of another to preserve his own, cannot invoke the doctrine of self-defense to justify a homicide committed under such circumstances: *Dabney v. State*, 113 Ala. 38, 59 Am. St. Rep. 92, and note. But the fact that one person with a grievance arms himself, and seeks an interview with the man who wrongs him, is not necessarily a provocation such as to deprive him of the right of self-defense: *Shannon v. State*, 35 Tex. Crim. Rep. 2, 60 Am. St. Rep. 17. While the duty to retreat is necessary in general, it has been held that such a duty is not required of one who is not the aggressor: *People v. Lewis*, 117 Cal. 186, 59 Am. St. Rep.

167, and note. And one is not obliged to retreat if he is attacked on his own premises: *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, and note.

HOMICIDE—MURDER IN THE FIRST DEGREE.—One cannot be guilty of murder in the first degree, unless the act was perpetrated not only with intent to kill, but also with deliberation and premeditation: *People v. Barberi*, 149 N. Y. 256, 52 Am. St. Rep. 717; *State v. Norwood*, 115 N. C. 789, 44 Am. St. Rep. 498; *Dabney v. State*, 113 Ala. 38, 59 Am. St. Rep. 92.

CRIMINAL LAW — CONFESSIONS — ADMISSIBILITY.—In criminal cases, confessions are prima facie inadmissible, and will not be received in evidence until it is shown to the court that they were voluntarily made, unless the objection is waived: *Bradford v. State*, 104 Ala. 68, 53 Am. St. Rep. 24, and note. See the monographic note to *Daniels v. State*, 6 Am. St. Rep. 242, for a discussion of the admissibility of confessions in evidence. The confessions of a person made under oath at a coroner's inquest are regarded as voluntary, and may be admitted in evidence: *Wilson v. State*, 110 Ala. 1, 55 Am. St. Rep. 17.

DE CAMP v. THOMSON.

[159 NEW YORK, 444.]

JUDGMENTS—SETOFF OF.—A judgment, to be available as a setoff, must be a valid subsisting obligation, final in its nature. Hence, judgments cannot be set off against each other where one of them has been appealed from and the appeal is still pending and undetermined..

SETOFF—CLAIMS MUST BE MUTUAL AND DUE.—Claims or demands sought to be set off must not only be mutual to the extent that they are owing by each to the other, but they must be due and payable, and, therefore, a claim not due cannot be set off against one that may be presently enforced.

SETOFF—DISCRETION OF COURT IN ALLOWING.—The question whether a setoff should or should not be decreed, rests in the discretion of the court to which the application is made, and is not subject to review. Such relief should be administered in all cases upon such equitable terms as will promote substantial justice, unless the absolute right is created by statute, or otherwise firmly established.

C. D. Adams, for the appellant.

C. E. Snyder, for the respondents.

446 MARTIN, J. On the twenty-ninth day of June, 1896, the plaintiff recovered a judgment against the defendants Dix and Thomson, which determined certain property rights then at issue, and also awarded to the plaintiff eighteen hundred and five dollars and thirty-four cents for his costs in that action. From that judgment an appeal was taken to the appellate divi-

sion in the fourth department, where, on the twenty-third day of May, 1897, it was affirmed, with costs, and a judgment of affirmance duly entered. From the last ⁴⁴⁷ judgment the defendants appealed to the court of appeals and gave the undertaking required by section 1327 of the Code of Civil Procedure, thereby staying execution until the decision of the court of appeals. When the appeal in the present case was taken, and also when it was argued, the appeal in that case had not been decided.

On the 15th of April, 1897, a second action was commenced by the plaintiff against the same defendants, a trial of which resulted in a dismissal of the complaint, and judgment was duly entered therein for costs amounting to three hundred and six dollars and five cents. In the last action a temporary injunction was issued, the plaintiff giving an undertaking in the sum of one thousand dollars conditioned for the payment to the defendants of any damages they might sustain by reason thereof. Upon the entry of judgment therein the injunction was dissolved. From that judgment no appeal was taken, and the time within which to appeal expired before the commencement of the present action. Subsequently, the defendants Dix and Thomson caused an execution to be issued upon the judgment in the second action, delivered it to the defendant Eaton, as sheriff, and directed him to make it out of the property of the plaintiff, which he was proceeding to do when the present suit was commenced.

The purpose of the present action was to compel the defendants Dix and Thomson to set off their judgment for three hundred and six dollars and five cents against the judgment for eighteen hundred and five dollars and thirty-four cents previously obtained by the plaintiff, and also to restrain them from collecting, or attempting to collect, the judgment in their favor, or any part thereof.

In this action the trial court held that the judgment in favor of the plaintiff was not due and payable at the time of the trial, because of the pending appeal therefrom and the stay of execution thereon, and that as the judgment of the defendants against the plaintiff was then due and payable and the defendants were entitled to immediate payment thereof, the plaintiff was not entitled to the relief sought. It thereupon directed a judgment in favor of the defendants, dismissing ⁴⁴⁸ the complaint, with costs. This judgment was unanimously affirmed by the appellate division.

The first question presented for our consideration is, whether notwithstanding the appeal in the first action and the stay of execution upon the judgment therein, the plaintiff had an absolute right to have the judgment against him set off against the judgment from which such appeal was taken. The authorities seem to be quite uniform to the effect that a judgment, to be available as a setoff, must be a valid, subsisting obligation and final in its nature, and hence that judgments cannot be set off against each other where one of them has been appealed from and the appeal is still pending and undetermined: *De Figaniere v. Young*, 2 Robt. 670; *Terry v. Roberts*, 15 How. Pr. 65; *Pierce v. Tuttle*, 51 How. Pr. 193; *Hardt v. Schulting*, 24 Hun, 345; *Matter of Kloster*, 40 Hun, 374.

It seems quite obvious that the plaintiff, at the time of the trial, had no absolute legal right to the setoff sought to be enforced by this action. His judgment was not then, and indeed might never become, payable or enforceable. Whether it would or not depended entirely upon the future action of the court to which the appeal had been taken. Although it was in form an absolute claim against the defendants, yet, in fact, it was contingent, depending upon the action of the court to render it efficient and enforceable. Hence, we think the mutuality necessary to authorize such a setoff did not exist.

The general rule relating to this subject is that claims or demands sought to be set off must not only be mutual to the extent that they are owing by each to the other, but they must be due and payable, and, therefore, a claim not due cannot be set off against one that may be presently enforced. To this rule there are, perhaps, some exceptions, as in the case of the insolvency of one of the parties, or where an assignment has been made. And yet, even in those cases, the party claiming the right of setoff is not entitled to such relief, unless his claim has matured before the assignment or transfer: *449 Martin v. Kunzmuller*, 37 N. Y. 396, 397; *Jordan v. National etc. Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *Fera v. Wickham*, 135 N. Y. 223; *Matter of Hatch*, 155 N. Y. 401.

Moreover, to have one judgment set off against another is not a matter of absolute right, but is within the equitable discretion of the court to which the application is made: *Alexander v. Durkee*, 112 N. Y. 655; *Baker v. Hoag*, 6 How. Pr. 201; *Zogbaum v. Parker*, 55 N. Y. 120, 121; *Simson v. Hart*, 14 Johns. 63; *Smith v. Lowden*, 1 Sand. 696; *Brown v. Hendrickson*, 39 N. J. L. 235; *Tolbert v. Harrison*, 1 Bail. 599; *Davidson v. Geoghagan*, 3 Bibb, 233; *Makepeace v. Coates*, 8 Mass. 451.

In some of the cases relating to this subject it is at least intimated that the question of discretion is, to some extent, controlled by the procedure adopted by the party seeking the set-off. While it may well be that the relief awarded or claimed may in some particulars be influenced or even regulated by the circumstances and the manner in which the question is presented, still, we think that, however it is presented, the determination of the question whether the setoff should, or not, be decreed, rests in the discretion of the court to which the application is made, and that such relief should be administered in all cases upon such equitable terms as will promote substantial justice, unless the absolute right is created by some statute, or otherwise firmly established. We find no such law or principle which is applicable to this case. Therefore, as this court can review questions of law only, and may not review the discretionary action of other courts, it follows that the question chiefly argued cannot be reviewed by us.

We are of the opinion that the decision of the court below was correct, and in view of the clear and satisfactory opinion of the trial court, which was adopted by the learned appellate division, we deem it unnecessary to further discuss the questions so ably presented by the counsel for the respective parties.

The judgment should be affirmed, with costs.

All concur.

JUDGMENTS—SETOFF—MATTER OF GRACE.—A judgment which represents the proceeds of exempt property cannot be set off on a judgment against the judgment creditor: *Cleveland v. McCanna*, 7 N. Dak. 455, 66 Am. St. Rep. 670, and note. On the question of the setoff of mutual judgments, see the extended note to *Duncan v. Bloomstock*, 13 Am. Dec. 729. The jurisdiction to set off one judgment against another is equitable in its nature, and the application therefor is addressed to the sound judicial discretion of the court, in the exercise of which equitable rights of persons not parties to the suit will be considered and protected: *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. Rep. 36; *Thropp v. Susquehanna etc. Ins. Co.*, 125 Pa. St. 427, 11 Am. St. Rep. 909.

SETOFF—CLAIMS MUST BE MUTUAL AND DUE.—The payment of a claim not yet due cannot be enforced by way of setoff until it is due: *Hayes v. Hayes*, 2 Del. Ch. 191, 73 Am. Dec. 709; *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643; *Spaulding v. Backus*, 122 Mass. 553, 23 Am. Rep. 391; *Ainsworth v. Bank of California*, 119 Cal. 470, 63 Am. St. Rep. 135. In equity, as at law, setoff is only allowed where there is a mutuality in the demands, and the amounts are liquidated and certain: *Smith v. Washington etc. Co.*, 31 Md. 12, 100 Am. Dec. 49; *Trafford v. Hall*, 7 R. I. 104, 82 Am. Dec. 589; *Annan v. Houck*, 4 Gill, 325, 45 Am. Dec. 133; *Gregg v. James, Breese*, 143, 12 Am. Dec. 151, and monographic note thereto.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

BROWN v. BROWN.

[124 NORTH CAROLINA, 19.]

HUSBAND AND WIFE—RIGHT OF PARENT TO ADVISE MARRIED CHILD.—In cases of unhappiness and disagreements between a married couple, the law recognizes the right of a parent to advise the son or daughter; and when such advice is given in good faith and results in a separation, the act does not give the injured party a right of action.

TORTS—MALICE—DEFINITION.—The term "malice," as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another.

HUSBAND AND WIFE—LIABILITY OF PARENT FOR ADVISING MARRIED CHILD TO ABANDON HUSBAND OR WIFE.—Before a parent can be held liable in damages for advising his married child to abandon his wife, or her husband, the conduct of the parent should be alleged and proved to be malicious.

HUSBAND AND WIFE—PARENT AND CHILD—ADVICE TO CHILD—MALICE.—The malice necessary to be alleged and proved against a parent for advising his married child to abandon his wife or her husband, is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove to the satisfaction of the jury that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose, the law presuming malice from such conduct in actions of this nature.

Civil action for damages.

G. W. Ward and Pruden & Pruden, for the appellant.

E. F. Aydlett, for the appellee.

²⁰ MONTGOMERY, J. The only question (raised by demurrer to the complaint) for decision when this case was here before (*Brown v. Brown*, 121 N. C. 8) was whether a married woman, abandoned by her husband, could maintain, without the joinder of her husband, an action in tort. The court held that such an action could be maintained. The present appeal is before us on exceptions to the charge of his honor.

The complaint contains three alleged causes of action: 1. That the defendant unlawfully, wrongfully, and wickedly intending to injure the plaintiff and to deprive her of the society and aid of her husband, destroyed the affection of her husband toward her and caused him to leave and abandon her; 2. That he commenced against her a false and malicious prosecution for alleged assault and battery upon her ²¹ husband; and 3. For the false arrest and imprisonment of the plaintiff, based upon such charge.

The defendant is the father of the plaintiff's husband, and in his answer there is a denial of the material allegations of the complaint.

The issues arising on the pleadings as to the last two causes of action were found in favor of the defendant, and therefore do not concern the appeal. The first issue was in these words: "Did defendants alienate the affection of the plaintiff's husband and cause him to abandon her, as alleged in the complaint?" The second issue was: "If so, what damage has plaintiff sustained?" His honor, in substance, instructed the jury that if they should find that the defendant willfully caused the defendant's husband to forsake and abandon her, the plaintiff would be entitled to recover, and the jury should answer the first issue, "Yes." And as to the measure of damages, the court charged the jury that if they should find that the defendant caused the plaintiff's husband to willfully forsake and abandon her, and that it was not done with malice, they should give only such actual damages as the plaintiff had sustained.

There was error in those instructions. The complaint in substance alleged that the conduct of the defendant was malicious. The charge of his honor was that, "if the jury should find that the defendant willfully caused the husband to abandon the wife, then the first issue (which raised the question of malice in the defendant) should be answered in the affirmative. The word 'willfully' does not mean maliciously. 'Willfully' implies that an act done in that spirit is done knowingly and obstinately and

persistently, but not necessarily maliciously": *State v. Massey*, 97 N. C. 465.

It cannot be that the law disregards the tender relations of kinship and natural affection between parent and child ²² and the duties which such relations impose, even though the child is married. In case of unhappiness and disagreements between the married couple, it is almost impossible to conceive of the indifference on the part of the parent to such conditions, and certain it is that the child naturally turns to the parent for comfort and advice under such circumstances. There are laws of natural affection and of natural duty, and municipal law will not obstruct their free operation as long as they are not abused. The presumption in fact and in law in all such cases must be, and is, that the parent will act only for the best interest of the child and for the honor of the family. In *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, where the defendant was the father of the plaintiff's husband, and the cause of action the same as that in the case before this court, it was said: "The law recognizes the right of the parent in such cases to advise the son or daughter; and when such advice is given in good faith and results in a separation, the act does not give the injured party a right of action. In such a case, the motives of the parent are presumed good until the contrary is made to appear." It was further said in that case that "These rules have been generally applied in cases where the suit was brought by the husband for the alienation of his wife, and we see no reason why they should not, with proper modifications, prevail when the wife is the plaintiff." In *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, the plaintiff was, as is the case in this action, the wife of the defendant's son, and the cause of action like the one alleged in the present case. The defendant there requested the court to charge the jury that: "If you find that the defendant caused the separation, yet you shall not render a verdict for the plaintiff, unless you find the defendant maliciously caused the separation." The court refused to give the instruction, and upon the appeal of the defendant ²³ the appellate court said: "This charge ought to have been given." The term "malice," as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another: *Weckerly v. Geyer*, 11 Serg. & R. 39, 40. If the conduct of the defendant was unjustifiable

and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged."

We are of the opinion, after having given the matter the serious consideration which it deserves, that, before a parent can be held liable in damages for advising his married child to abandon his wife, or her husband, the conduct of the parent should be alleged and proved to be malicious; that the willful advice and action of the parent in such a case may not be necessarily malicious, for the parent may be determined and persistent and obstinate in his purpose to cause the separation, and yet be entirely free from malice—in fact, have in view the highest good of his child. Our opinion, however, is that the malice necessary to be alleged and proved is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove to the satisfaction of the jury that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose—the law presuming malice from such conduct in actions of this nature.

Error.

HUSBAND AND WIFE—RIGHT OF PARENT TO ADVISE MARRIED CHILD—LIABILITY.—A father has the right to advise his son, and, if he acts with proper motives and in good faith in doing so, cannot be regarded as an intermeddler; but a father who, maliciously and with a view to separating his son and the latter's wife, aids, advises, and assists, and, by promises or threats, procures his son to leave his wife, is liable to an action by her: *Gerner v. Gerner*, 185 Pa. St. 233, 64 Am. St. Rep. 646, and note. Monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 477. Alienation of husband's affections by relatives generally: *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360.

YANCEY'S CASE.

[124 NORTH CAROLINA, 151.]

DEVISE—REMAINDER TO PERSONS NOT IN ESSE—JURISDICTION—SALE OF PROPERTY.—Where property is devised for life, with a remainder over to persons not in esse, the life tenant still living, a court has no power to order a sale of the property, because there can be no one before the court to represent the interest of the remaindermen.

DEVISE—REMAINDER TO UNDETERMINED PERSONS—JURISDICTION—SALE OF PROPERTY.—Where property is devised for life, with a remainder over to "such children as should

be living at the death of the life tenant," a court has no power to order a sale of the property, for until the death of the life tenant it could not be known who would take.

DEVISE—GENERAL REMAINDER—REMAINDERMEN BEFORE THE COURT—JURISDICTION—SALE OF PROPERTY. Where property is devised for life, with a general remainder over in which there is no element of survivorship, a court may order a sale of the property where all the remaindermen living are before it, since the remaindermen represent a class, and those who may afterward be born are concluded by the action of the court upon those of the same class.

DEVISE—REMAINDERMEN—SALE OF PROPERTY—TITLE OF PURCHASER.—When property, which is devised for life with a general remainder over, is sold under an order of court, all the remaindermen living being before the court, the purchaser will acquire a good title against afterborn children of the life tenant.

Petition, *ex parte*, for the sale of land for reinvestment. There was an order of sale. One of the purchasers refused to complete his purchase on the ground that he did not buy a good title.

Shepherd & Busbee, for the appellees.

No counsel contra.

152 **FAIRCLOTH, C. J.** N. S. Harp devised as follows: "All the residue of my estate, real and personal and mixed, I give and bequeath to my wife, Lucy H. Harp, during her natural life, and then in remainder to my daughter, Elodia Benton Yancey, wife of Thomas B. Yancey, during her natural life, and then to her children." Elodia and her children, some of whom are minors represented by their next friend, ask the court to order a sale of the land, and that the proceeds be invested under the direction of the court for their benefit. The purchaser of one lot declines to pay his bid, and raises the question whether the court has the power to order the sale, and that is the only question.

We are not considering whether Elodia acquired an estate in fee or for life only. She and her children are asking for a sale. The only suggested difficulty is that by possibility she may have other children, whose interest cannot now be sold. We think that appellant's contention is untenable. **153** When the life tenant, still living, has no child, it has been held that the court has no power to order a sale of land, where it is limited in remainder to persons not in esse, because there can be no one before the court to represent their interest: *Watson v. Watson*, 56 N. C. 400; *Justice v. Guion*, 76 N. C. 442.

So, also, if the devise was in remainder to such children as should be living at the death of the life tenant the court could not sell, for until that event it could not be known who would take: *Miller, Ex parte*, 90 N. C. 625; *Williams v. Hassell*, 74 N. C. 434.

But when all the remaindermen living are before the court, they represent a class, and when the gift is general and there is no element of survivorship in it, it is otherwise, and by representation those who may afterward be born are concluded by the action of the court upon those of the same class then before it, and the purchaser at such sale will acquire a good title against afterborn children of the same life tenant: *Irvin v. Clark*, 98 N. C. 437.

In *Williams v. Hassell*, 74 N. C. 434, the court said: "Suppose in the case before us the devise had been to the first takers for life, remainder to their children; that would take in all the children, as well those born after the death of the testator as those born before, and in such case it may be that the born child might be allowed to represent the class." That supposed case is just what we now have before us.

The investment will be made as the court may direct, and the cause is retained for further direction.

It is to the interest of our people that the title to property should be clogged as little as possible with "limitations," "trusts," et cetera, and public policy requires that the alienation of land should be as free from such condition as any article of traffic.

Affirmed.

DEVISE—REMAINDERS—SALE OF PROPERTY.—An order for the sale of real estate of decedent is invalid, if persons in whom a contingent remainder is vested by the will of the decedent are not cited to appear, and given an opportunity to resist the granting of such order. So held where the provisions of a will gave the use of a farm to the testator's son for life, and at the son's death to vest in his children, should he leave any; and in default of such children, then to the issue of the testator's brothers and sisters; and at the time of the proceedings for the order of sale, the son and four of his children were living, as well as a number of children of the testator's brothers and sisters, who were not cited to appear: *Wilson v. White*, 109 N. Y. 59, 4 Am. St. Rep. 420. On the sale of contingent remainder under execution, see *Haward v. Peavey*, 128 Ill. 430, 15 Am. St. Rep. 120, and note. See the note to *Snelling v. Lamar*, 17 Am. St. Rep. 840.

TROXLER v. SOUTHERN RAILWAY COMPANY.

[124 NORTH CAROLINA, 189.]

MASTER AND SERVANT—DUTY OF MASTER—SAFE APPLIANCES.—The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence cannot be attributed to the negligence of a fellow-servant.

RAILROAD COMPANIES—NEGLIGENCE PER SE—FAILURE TO USE SELF-COUPLING DEVICES.—Failure of a railroad company to equip its freight-cars with modern self-coupling devices is negligence, per se.

RAILROAD COMPANIES—FAILURE TO USE SELF-COUPLING DEVICES—NEGLIGENCE OF EMPLOYEE.—Where a railroad company fails to equip its freight-cars with modern self-coupling devices, and an employé is injured in coupling cars by hand, the company is liable, whether such employé was negligent in the manner of making the coupling, or not.

MASTER AND SERVANT—CONTINUING NEGLIGENCE OF MASTER—CONTRIBUTORY NEGLIGENCE OF SERVANT.—Where the negligence of the defendant is a continuing negligence, there can be no contributory negligence which will discharge the master's liability.

MASTER AND SERVANT—NEGLIGENCE PER SE—FAILURE TO USE SAFE APPLIANCES IN GENERAL USE.—When safer appliances have been invented, tested, and have come into general use, it is negligence per se for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers.

RAILROAD COMPANIES—SAFE APPLIANCES—DEFENSE OF POVERTY.—If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it.

RAILROAD COMPANIES—DUTY TO USE SAFE APPLIANCES IN GENERAL USE.—The employés of a railroad company and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience and which have come into general use.

Civil action to recover damages for personal injuries, alleged to have been occasioned by the defendant's negligence. The plaintiff was a brakeman on the defendant's train, and by direction of the conductor undertook to couple two cars, which were not furnished with automatic couplers. Plaintiff's hand was injured.

F. H. Busbee, for the defendant.

C. M. Steadman and D. Schenck, Jr., for the plaintiff.

¹⁹⁰ CLARK, J. The plaintiff was injured in attempting to couple cars of the defendant on which there were no automatic

car-couplers, ¹⁹¹ but in lieu thereof skeleton draw-heads of unequal height. The court below held that the absence of automatic couplers, in general use, was negligence, per se, and refused to submit an issue whether the injury was not caused by the negligence of a fellow-servant, and refused to instruct the jury, as prayed, that the plaintiff was guilty of contributory negligence if he could by proper care have coupled the cars by hand without accident.

The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence cannot be attributed to the negligence of a fellow-servant: *Troxler v. Southern Ry. Co.*, 122 N. C. 902; *Wright v. Southern Ry. Co.*, 122 N. C. 959. It has been heretofore held in *Greenlee v. Southern Ry. Co.*, 122 N. C. 977, 65 Am. St. Rep. 734, that failure of a railroad company to equip its freight-cars with modern self-coupling devices is negligence, per se, continuing up to the time of an injury sustained by an employé in coupling cars by hand, and renders the company liable, whether such employé was negligent in the manner of making the coupling, or not. The same ruling had been previously made as to the duty of furnishing automatic car-couplers on passenger trains in *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482, 32 Am. St. Rep. 814, decided in 1892. Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury), there can be no contributory negligence which will discharge the master's liability. This has been repeatedly held: *Norton v. North Carolina R. R. Co.*, 122 N. C. 911; *McLamb v. Wilmington etc. R. R. Co.*, 122 N. C. 873; *Cone v. Delaware etc. R. R.*, 81 N. Y. 206, 37 Am. Rep. 491. The failure to provide the necessary appliances is the *causa causans*. The defendant, however, frankly asks us to reconsider and overrule *Greenlee's* case. That case was the expression of no new doctrine, but the affirmation of one ¹⁹² as old as the law, and founded on the soundest principles of justice and reason, to wit: That when safer appliances have been invented, tested, and have come into general use, it is negligence, per se, for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers: *Witsell v. West Asheville etc. Ry. Co.*, 120 N. C. 557. This must be so, if masters owe any duties to their em-

ployés, and unless economy of expenditures on the part of the railroad management is to be deemed superior to the conservation of the lives and limbs of those employed in their operation.

In the twelfth annual report of the interstate commerce commission (1898), published by authority of the United States government, upon returns made by the railroad companies themselves, it is stated (at page 88): "Since the enactment of the law in 1893 (requiring automatic couplers) there has been a decreasing number of casualties. There were 1,034 fewer employés killed and 14,062 fewer injured during the year ending June 30, 1897, than during the same period in 1893. The importance of this subject will be realized when the yearly casualties to railway employés are compared with those which occurred during the recent war. In the Spanish-American War there were 298 killed and 1,645 wounded. In 1897 there were 1,693 men killed and 27,667 injured from all causes in railway service. From coupling and uncoupling cars alone 219 less were killed and 4,994 less were injured in 1897 than in 1893, when the law was enacted. The number of such employés killed has been reduced one-half, and the number of injured also practically reduced one-half. The reduction in the number of accidents from all causes largely exceeded (by nearly three to one) in a single year the entire casualties resulting from the prosecution of the late war."

¹⁹³ Thus in four years—from 1893 to 1897—notwithstanding the increase of thousands of miles of railways, and many thousands of employés, and the further fact that the railroad corporations have been able to procure from the interstate commerce commission an extension of the time at which the law of Congress, imposing a penalty for operating any cars without self-couplers, will come into force, the shadow of the law has procured so general an attachment of these self-couplers, that 5,213 fewer employés were killed and wounded in coupling and uncoupling cars in 1897 than in 1893. Can it, therefore, be seriously contended that the absence of such safety appliances is not negligence per se, rendering the railroad company liable for damages? As these appliances have been patented, and more or less in use for over thirty years, it should not have required an act of Congress to enforce their universal adoption. Failure to adopt them, after being so long and widely known and used, was negligence in the defendant, upon the principles of the common law: *Witsell v. West Asheville etc. Ry. Co.*, 120 N. C. 557. The act of Congress imposing a penalty for failure to add

the appliances after January 1, 1898, in no wise affected the right of any employé to recover for damages, sustained by the negligence of any railroad company to attach them. The action of the interstate commerce commission, in extending the date at which such act should come into force (by virtue of authority given in the act) could not set aside the principle of law that failure to adopt such appliances was negligence per se, nor have any other effect than to postpone the date at which the United States government would impose the prescribed penalty upon all railroads engaged in interstate commerce failing to equip all their cars with automatic couplers, a penalty which is imposed irrespective whether any accidents occur from such failure or not.

194 The indifference of railroad companies shown in not adopting these life and limb-saving appliances is all the greater, since their cost is comparatively small. Indeed, the interstate commerce commission, in the above-cited report (page 89), state that, considering the less expense required in repairs, they are an actual saving. They say: "Figures submitted by one of the leading railroad companies indicate that the adoption of the automatic coupler will result in saving a very large sum annually, in comparison with the expense incurred in former years, in applying and maintaining the link and pin type; and this does not take into account the reduced cost to the roads, which must result from fewer suits for damages by injured employés. And further, that there being too much slack in the old pin and link for the brake to act economically or successfully, the automatic coupler makes the requirements of railroad operation better, as well as minimizes the danger to employés."

In *Witsell v. West Asheville etc. Ry. Co.*, 120 N. C. 557, 562, it is said: "If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But not only, as above, the use of self-couplers would be an actual economy to the defendant, but that it is amply able to put on these appliances, if it were not, is shown by the published report of the defendant company that its gross earnings for the year 1895 (when this injury was inflicted) were over \$17,000,000, and its net earnings, over and above all expenses, were more than \$5,000,000 (*Poor's Railroad Manual*, 1898, 792)—figures which for the year just past have risen to over \$22,000,000 gross earnings and over \$7,300,000 net earnings.

With such an array as above of the terrible cost of life and limb by failure to use appliances to avoid coupling and uncoupling ¹⁹⁵ cars by hand (in doing which the plaintiff was injured), and the small expense, nay, actual economy, of adopting them, and the ample means the defendant possesses, we cannot reverse our ruling in Greenlee's case, that it is negligence per se in any railroad company to cause one of its employés to risk his life or limb in making couplings which can be made automatically without risk.

This matter of requiring these great corporations to protect the traveling public, and their employés as well, by the adoption of all safety appliances which have come into general use, is so important that we have gone into the subject at this length. Ordinarily owned by great syndicates out of the state in which they operate, and their management at all events removed from subjection to that sound public opinion which is so great a check upon the conduct of individuals and of government itself, the sole protection left to the traveler and the employé alike is the application of that law which is administered impartially, and which can lay its hand fearlessly upon the most powerful combination and protect with its care the humblest individual in the land.

The subject is one of transcendent importance, for notwithstanding the partial adoption of these appliances and consequent reduction in casualties, the twelfth interstate commerce commission shows (page 77) that for the year ending June 30, 1897, on the railroads engaged in interstate commerce (which alone report to that commission), there were still 43,168 casualties, of which 6,437 resulted in death. Of these 1,693 killed and 27,667 wounded were railroad employés, among whom 214 were killed and 6,283 wounded in coupling or uncoupling cars. In our own state, the report of the North Carolina railroad commission for 1898 (pages 250, 251) shows that for the year ending June 30, 1898, the railroads reported 879 persons killed and wounded (of ¹⁹⁶ whom 99 were killed) and of these, 23 of the killed and 599 of the wounded were employés—total, 622. As, of the 9,000 employés reported in this state, 4,000 (according to the usual ratio) were employés engaged in the actual operation of the trains, it follows that in this state one such employé in every 6½ was in that year injured or killed. In view of such mortality, rivaling that of the bloodiest wars, this court cannot reverse its declaration heretofore, which is sustained by every sentiment of

justice and humanity, that where a life and limb-saving appliance, like automatic car-couplers, has come into general use, and its partial adoption has in four years, notwithstanding the increase in railroad mileage and employés, decreased the injuries and deaths from coupling cars one-half, that the failure to adopt and use it is negligence per se.

Considering the economy in money of using such appliances, as well as the ample revenues of the defendant, it is passing strange that it (or any other railroad company) should have delayed till now, or even till 1895, to protect the lives and limbs of their employés in this particular, or that there should have been need of an act of Congress or the verdict of a jury to stimulate considerations of humanity toward their patrons and their employés.

Counsel for defendant read, as part of his argument, a clipping from a newspaper, and repeats in his brief, that a noble English lord, who was a railroad manager as well as an hereditary member of Parliament, had changed his party affiliations because the one to which he had belonged had advocated the enforced adoption of self-couplers upon English railways. That simply shows that one such manager, at least, possesses a lordly disregard for the thousands of deaths and injuries of employés yearly, caused by the lack of safety appliances, and it may be there are others who entertain sentiments ¹⁹⁷ of higher allegiance to the net earnings of the syndicates that employ them than to those great principles which every political party professes to advocate, as being for the best interests of the public. But the hostility of one or more railway managers toward the matter cannot affect the impartial enforcement of the sound legal principle that employés and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience and which have come into general use.

In the present case, the defendant has the less excuse because there was uncontradicted testimony not only that automatic car-couplers were in general use at the time of the injury (March, 1895), but that the skeleton draw-heads, in attempting to make a coupling with which the plaintiff was injured, were defective in that they were of different heights from the ground, and evidence that the cars could not have been coupled with a stick or in any other manner, except by hand.

MASTER AND SERVANT—DUTY OF MASTER TO FURNISH SAFE APPLIANCES.—It is the duty of the master to the servant to furnish sufficient, properly constructed, and safe machinery, or other materials or appliances, to be used by the servant in the course of his employment and necessary for the service: *Meador v. Lake Shore etc. Ry. Co.*, 138 Ind. 290, 46 Am. St. Rep. 384; *Nord Deutscher etc. Co. v. Ingebregsten*, 57 N. J. L. 400, 51 Am. St. Rep. 604.

RAILROAD COMPANIES—SELF-COUPLERS—NEGLIGENCE. The rule is well settled in North Carolina that the failure of a railway company to equip its freight-cars with self-coupling devices is negligence per se, for which it is liable in damages to an employé who receives an injury while coupling cars by hand, whether he is guilty of contributory negligence or not: *Greenlee v. Southern Ry. Co.*, 122 N. C. 977, 65 Am. St. Rep. 734, and monographic note thereto, in which it is shown that the North Carolina doctrine is not supported by the weight of authority. A railroad company need not furnish the best machinery: *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482, 32 Am. St. Rep. 814. Neither is a railroad company required to adopt every appliance which even a majority of the well-regulated roads have adopted: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863. See the note to *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 213.

BEAR v. COMMISSIONERS.

[124 NORTH CAROLINA, 204.]

ESTOPPEL—NECESSITY TO PLEAD.—Where a party has an opportunity to plead an estoppel, and voluntarily omits to do so, but goes to the issue on the facts, he thereby waives the estoppel, and the jury is at liberty to find according to the facts of the case.

ESTOPPEL—PLEADING—DEMURRER.—Where the advantage might have been taken of an estoppel by means of a demurrer, and the party fails to so take advantage of it, he will be held to have waived the estoppel.

MANDAMUS—NATURE.—Mandamus is in the nature, both of an execution and of a civil action.

MANDAMUS—NATURE—CIVIL ACTION.—Mandamus is in the nature of a civil action, and is commenced by summons, and the pleadings and the practice are the same as are prescribed for the conducting of civil actions.

SCHOOLS—SCHOOL FUNDS—LIABILITY OF COUNTY.—School orders issued by the school committee upon the treasurer of the county board of education, under the North Carolina laws in force in 1886, were payable out of the school fund only, and were not a valid charge upon the public funds of the county.

MANDAMUS TO COMPEL COUNTY COMMISSIONERS TO LEVY TAX—CONSTITUTION.—Under a constitutional provision prohibiting any tax from being levied by any county, city, or town, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein, before mandamus can be issued to compel the board of commissioners of a county to levy a tax to pay a judgment against the commissioners, the plain-

tiff—judgment creditor—must show affirmatively by the record or other competent evidence that the consideration of the debt, upon which the judgment was obtained, was of such a character as to fall under the head of ordinary or necessary county expenses.

E. K. Bryan and Frank McNeill, for the defendants.

J. D. Bellamy and Shepherd & Busbee, for the plaintiff.

²⁰⁵ MONTGOMERY, J. This case is before us on a petition to rehear, the first opinion having been filed at the spring term, 1898, and published in *Bear v. Board of Commrs.*, 122 N. C. 434, 65 Am. St. Rep. 711. After further argument and a closer investigation, we have arrived at the conclusion that there was error in the former opinion in its reversal of the judgment of the superior court. That judgment ought to have been affirmed.

The plaintiff in his complaint alleged that the defendants were indebted to him in the sum of dollars due by eight judgments originally had in a court of a justice of the peace, and afterward docketed by transcript in the office of the clerk of the superior court of Brunswick county, and prayed judgment that the defendants be compelled to levy a tax to pay the judgments and costs. The defendants, in their answer, admitted that the judgments were procured as alleged, but averred that they were not valid and binding against the defendants, for the reason that they were obtained against a former board of commissioners on school claims for which neither the defendants nor their predecessors were liable in law. The defendants further aver that the judgments were obtained on certain school orders issued about the year 1886 by the school committeemen of certain school districts of Brunswick county upon the treasurer of the county board of education, and that they were not a valid charge against the defendants, the board of commissioners, or a charge upon the public funds of the county, or upon any other ²⁰⁶ fund except those expressly set apart for school purposes. And for a further defense the defendants aver that section 7, article 7, of the constitution of North Carolina prohibits any tax from being collected or levied by any county, city, or town, or other municipal corporation, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein; and the defendants aver that the consideration upon which the judgments were had was not for the necessary expenses of the county or for a debt contracted in the manner provided by the constitution.

When the case came on for trial a jury trial was waived, and it was agreed that his honor who presided should find the facts, and the case was heard by the court by the consent of counsel of the plaintiff and of the defendants. What facts could have been in the minds of the counsel, except the facts connected with the consideration of the claims on which the original judgments were procured, and those connecting the judgments of 1894, docketed in the superior court by transcript, as being the same judgments which were originally rendered by the justice of the peace in 1888? No other facts could have been referred to, for they were raised by the pleadings, and the defendants in their answer had admitted that the judgments had been obtained by the plaintiff, as set out in his complaint. The plaintiff, having failed to plead his judgments in estoppel of the matter set out in the answer, or to demur to the answer, waived his rights as to any advantage which the law had given to his position, and by his agreement to submit the facts to the finding of the court, went to the hearing on the merits of the original consideration upon which the judgments were granted. "Numerous decisions in this country and England hold that where a party has an opportunity to plead an estoppel, and voluntarily ²⁰⁷ omits to do so, but goes to the issue on the facts, he thereby waives the estoppel, and the jury is at liberty to find according to the facts of the case. So, where the advantage might have been taken of an estoppel by means of a demurrer, and the party fails to so take advantage of it, he will be held to have waived the estoppel": 8 Am. & Eng. Ency. of Law, 13, and cases there cited. If the plaintiff intended to avail himself of the full benefit and effect of his judgments, it was incumbent on him to do so, by some proper pleading because of the nature of defendant's answer, for, though mandamus is in the nature of an execution, yet it is in the nature of a civil action; it is commenced by summons and the pleadings, and the practices are the same as are prescribed for the conducting of civil actions: Code, sec. 623.

His honor found as a fact upon the evidence, none of which was objected to, that the original judgments were obtained upon certain school orders issued during the year 1886, and that the judgments of 1894 in the superior court were the same judgments which were obtained before the justice of the peace in 1888, and that there was nothing in the record or judgment of 1894 to show what the cause of action was, except that they were brought on former judgments. Now, upon his honor's findings

of fact, the legal question arises, Were school orders issued in 1886 a debt for which the county was liable, and for which the board of commissioners could be made to provide by taxation? We think not.

The law in force at the time when the school orders upon which the plaintiff's action was brought were issued, was the code, chapter 15, volume 2, as amended by chapter 174 of the acts of 1885. Section 2551 of the code provides that the county board of education shall, on the first Monday in January ²⁰⁸ of each year, apportion among the several districts all school funds, specifying how much of the same is apportioned to each race, and give notice thereof to the school committees of the several districts of the county. It is further provided in the same section that the sums thus apportioned to the several districts shall be subject to the orders of the school committees thereof, for the payment of the school expenses authorized by law. In section 2555 of the code it is provided that "all orders upon the treasurer of the county board of education for school money for the payment of teachers, duly countersigned by the county superintendent of public instruction, and all orders for the purchase of sites for schoolhouses, and for the costs of building, repairing, and furnishing schoolhouses, shall be signed by the school committee of the district in which the school is taught, or in which the site or schoolhouse is situated, which orders, duly indorsed by the person to whom the same are payable, shall be the only valid vouchers in the hands of the treasurer of the county board of education, to be paid out of the funds apportioned to the district in which the schoolhouse is erected."

The county treasurer of each county was required to receive and disburse the public school funds, not under his general bond, but under a separate bond conditioned for the faithful performance of his duties as treasurer of the county board of education. The county board of education were empowered, if they deemed it necessary, to require the treasurer of the county board of education to strengthen his bond, and for any breach of that bond action was to be brought, not by the county commissioners, but by the county board of education: Code, sec. 2554.

The treasurer of the county board of education was required to open accounts with each public school district, and report yearly to each school committee the amount apportioned ²⁰⁹ to the respective districts for the year, and to the county board of

education the amounts received from all sources for public school purposes.

From this review of the law in force when the school orders were issued, upon which the plaintiff's judgments were obtained, it appears that there was a complete separation of the school funds from the general county fund upon the apportionment being made, and from that time all control of the same by the county commissioners ceased; that the funds were taken charge of by the treasurer of the board of education under a separate bond; that the disbursements were made by that officer under orders signed by the school committees; that the accounts of the school fund were kept by that officer and the several school committees, and a report, yearly, to the county board of education, made of all receipts of school funds by him, and the amount apportioned to each district was the fund out of which school orders were to be paid.

The county, therefore, through the board of commissioners, was not liable for the debt upon which those orders were issued.

If the amount apportioned to the district or districts upon whose committee or committees the orders were drawn had been in the hands of the treasurer of the board of education, and he had defaulted in their payment, then the law required action for such defalcation to be instituted against that officer and his bond. If there never had been in the treasurer's hands any funds to meet those orders, because they were improperly issued, then there was no liability on either the county or the treasurer.

But besides the view of this case, as expressed above, we are of the opinion that before mandamus can be issued to compel the board of commissioners of a county to levy a tax ²¹⁰ to pay a judgment against the commissioners, the plaintiff—judgment creditor—must show affirmatively by the record or other competent evidence that the consideration of the debt, upon which the judgment was obtained, was of such a character as to fall under the head of ordinary or necessary county expenses. Any other view of the law would enable a board of county commissioners to levy a tax to pay a debt reduced to judgment by confession or by default, which debt, under section 7 of article 7 of the constitution, the county would be prohibited from contracting, unless the question was submitted to a vote of the qualified voters of the county. Such a course would, in effect, be a convenient method, whenever the county commissioners might choose to do so, of destroying a most salutary provision of the constitution. It would be equivalent to holding that, by a rule

of pleading, a plain provision of the constitution can be abolished. No technical learning based on the rules of pleading can force us into such a conclusion.

The prayer of the petitioners must, therefore, be granted. The case must be reheard, and the judgment of this court entered therein at the spring term, 1898, must be set aside, and judgment entered at this term affirming the judgment of the superior court. Prayer of the petitioners granted.

FAIRCLOTH, C. J., dissented, on the ground that the judgments, being based upon school claims, were a necessary expense, and that mandamus would lie. "We must consider whether the expense of the public common county school system is a necessary expense. What is a necessary expense is a question for the court, whenever the question arises. It is necessary for the good, safety, and happiness of the whole people that certain benefits and improvements shall be recognized as necessary expenses. The public school system tends to improve the manners, morals, and material condition of the people in the march of civilization. This court has often said that the building of courthouses, public roads, and bridges are necessary expenses: *Vaughn v. Commissioners*, 117 N. C. 434. . . . Public education is a cherished object of our constitution and of our legislature and people. It is of vital importance to society and to the state. Is it less so than a public bridge across a stream which can be crossed by a common ferry boat?" The dissenting opinion cites, also, the North Carolina constitution, article 1, section 27, and article IX, sections 2, 4, and 15; *Lutterloh v. Commissioners*, 65 N. C. 403.

ESTOPPEL—NECESSITY TO PLEAD.—Estoppels in pais must be specially pleaded to be available as a defense: *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, and note. An estoppel of record, to be effectual, must be pleaded, if there is an opportunity to plead it: *Water Commrs. v. Cramer*, 61 N. J. L. 270, 68 Am. St. Rep. 705. One who has an opportunity to plead an estoppel, but does not, thereby waives it: *Nickum v. Burekhardt*, 30 Or. 464, 60 Am. St. Rep. 822. See the monographic note to *Tyler v. Hall*, 27 Am. St. Rep. 344.

MANDAMUS—NATURE.—Mandamus is regarded, in modern practice, as an action by the party on whose relation it is granted to enforce a private right when the law affords no other adequate means of redress: *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791. See, also, *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *Swift v. Richardson*, 7 Houst. 338, 40 Am. St. Rep. 127.

MANDAMUS TO COMPEL LEVY OF TAX.—See, on this question, *Coy v. City Council*, 17 Iowa, 1, 85 Am. Dec. 539, and note thereto.

KENDRICK v. LIFE INSURANCE COMPANY.

[124 NORTH CAROLINA, 815.]

INSURANCE—POSSESSION OF POLICY.—Possession of an insurance policy, at the death of the insured, makes out a prima facie case.

INSURANCE—PAYMENT OF PREMIUM—RECITALS IN THE POLICY—ESTOPPEL.—The acknowledgment in the policy of the receipt of the premium estops the company to test the validity of the policy on the ground of nonpayment of the premium.

INSURANCE—RECITALS OF PAYMENT IN THE POLICY—WHEN A MERE RECEIPT.—In so far as a recital in an insurance policy of the payment of premium is a mere receipt for money, it is only prima facie like other receipts, and will not prevent an action to recover the money if not in truth paid.

INSURANCE—RECITALS OF PAYMENT IN THE POLICY—WHEN PART OF CONTRACT.—In so far as a recital in an insurance policy of the payment of premium is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy.

DEEDS—RECITALS IN AS TO PAYMENT—EVIDENCE TO CONTRADICT.—Although it is always competent to contradict the recital in a deed as to the amount paid, in an action involving the recovery of the purchase money, or as to the measure of damages in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed in creating or passing a title to the estate thereby granted.

INSURANCE—INSTRUCTIONS TO AGENTS—EVIDENCE AGAINST THE COMPANY.—The instruction to agents that if the premium was paid more than thirty days after due there must be a health certificate is evidence against the company that credit or indulgence of payment was allowable.

INSURANCE—INSTRUCTIONS TO AGENTS NOT BINDING ON THE INSURED.—The instruction to agents that after thirty days' delay in the payment of premium a health certificate is required is not binding on the insured, who may rely upon the provision in the policy itself that the payment must be made "during life."

INSURANCE—CONSTRUCTION OF POLICY.—The uniform rule of construction of insurance policies is, that if reasonably susceptible of two constructions, that one will be adopted which is more favorable to the insured.

CONTRACTS—CONSTRUCTION OF PROMISES.—It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee.

CONTRACTS—CONSTRUCTION OF.—If it be left in doubt whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee.

TRIAL—REFUSAL OF COURT TO SUBMIT ISSUES.—Where every phase of a defendant's contention could be and was presented without prejudice under the issue submitted by the court, the refusal to submit other issues, though asked, is not error.

Burwell, Walker & Cansler, for the defendant.

Jones & Tillett, for the plaintiff.

316 CLARK, J. John F. Kendrick applied for insurance on his life in the defendant company for the benefit of his wife, the plaintiff, and on the 15th of July, 1897, the defendant issued its policy in accordance with the terms of the application, which was delivered by its agent to him, a few days thereafter. He was afterward taken ill with typhoid fever and died on the 15th of September, 1897. The policy recited the payment of the premium, though in fact it was not paid until a few hours before, and in fact, on the same day on which the insured died, the payment being then made for him by a friend and accepted by the local agent with full knowledge of Kendrick's critical condition. This agent had theretofore indulged the payment, stating that it would be sufficient if the payment was made during Kendrick's life. The policy contained a provision: "This policy does not take effect until the first premium shall have been actually **317** paid during the lifetime of the insured." There was in the instructions of the company, in the hands of its agents, a further provision, that: "When a premium is paid more than thirty and within sixty days after due, a certificate of good health, signed by the applicant, will be required." It was not shown that John F. Kendrick had notice of this instruction.

These, in substance, were the facts. The plaintiff, to whom the policy was payable, was in possession of the policy, and, the death of the insured being admitted, this made out a *prima facie* case. In the absence of evidence, the policy is presumed to have been delivered at the time it bears date: *Meadows v. Cozart*, 76 N. C. 450; *Lyerly v. Wheeler*, 34 N. C. 290. The authorities are numerous and quite uniform that the acknowledgment in the policy of the receipt of the premium estops the company to test the validity of the policy on the ground of nonpayment of the premium. In so far as it is a mere receipt for money, it is only *prima facie* like other receipts, and will not prevent an action to recover the money, if not in truth paid; but in so far as it is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy. The rule is thus stated in 2 *Biddell on Insurance*, section 1128: "As a general rule, it has been held in the United States that while such a re-

ceipt will prevent the insurer from proving the premium was unpaid in order to show the policy was void from its inception, it may be contradicted in order to show, on a suit for premium, that no payment had been made," citing numerous cases in the note. To same effect the law is summed up and stated in 19 Am. & Eng. Ency. of Law, 1126; *Basch v. Humboldt Ins. Co.*, 35 N. J. L. 429, in a very clear statement by Beasley, C. J., citing *Provident Ins. Co. v. Fennell*, 49 Ill. 180; *New York Cent. Ins. Co. v. National etc. Ins. Co.*, 20 Barb. 471. Chancellor Kent says (3 Kent's Commentaries, 260): "The receipt of the premium in the policy is conclusive of payment and binds the insurer unless there is a fraud on the part of the insured." To like purport, *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Goit v. National etc. Ins. Co.*, 25 Barb. 189, 192; *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606, 24 Am. Rep. 344; *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354, 356, 87 Am. Dec. 251; *Teutonia Ins. Co. v. Mueller*, 77 Ill. 22, 24; Phillips on Insurance, secs. 514, 515; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 240; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Consolidated etc. Ins. Co. v. Cashow*, 41 Md. 60, 76. In striking analogy is the same rule as to receipts in deeds. In 3 Washburn on Real Property, 614, the fourth rule applying to receipts in deeds is as follows: "Although it is always competent to contradict the recital in the deed as to the amount paid, in an action involving the recovery of the purchase money, or as to the measure of damages, in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed in creating or passing a title to the estate thereby granted." This is quoted and approved in *Barbee v. Barbee*, 108 N. C. 584, and it may be said, in passing, that the difficulty in reconciling opinions expressed in that case was due to the failure to note the double aspect of a recital in a deed of payment as being a mere receipt for money, and therefore only prima facie, in an action to recover the money, and as being sometimes also a part of the contract and therefore not to be impeached, except for fraud, et cetera, when the validity or effect of the contract depends on prepayment, a distinction which is clearly pointed out by Ashe, J., in *Harper v. Dail*, 92 N. C. 394, citing *Wilson v. Derr*, 69 N. C. 137.

The above proposition being true even when the policy is made payable to the estate of the insured, a fortiori the defendant ³¹⁹ company is estopped when the beneficiary is a third

party: *Kline v. National Ben. Assn.*, 111 Ind. 462, 60 Am. Rep. 706.

Certainly, it is not the defendant who can except because the court charged the jury: "If, when the policy was handed to Kendrick by the agent, it was not the understanding that it should then take effect as a policy, then Kendrick could not, by sending this amount as a payment, create or put in force a contract of insurance, although the agent during Kendrick's sickness may have agreed and directed that he should do so. On the other hand, although defendant may show that as a fact the recital of the payment of premium was not true, yet if the policy was delivered to operate as a contract of insurance, it cannot contend that the policy was invalid because the premium was not paid" (at time of delivery). If it be conceded, contrary to authorities above recited, that the proviso in the policy, that it shall not be effective "unless the first premium shall have been actually paid during the lifetime of the insured," removed the estoppel arising from the acknowledgment of the receipt of the money, the condition was complied with by the actual payment of the money in the lifetime of the insured, which related back to the date of the policy. The instruction to agents, as recited in the letter of the general agent, that if the premium was paid more than thirty days after due there must be a health certificate, is evidence against the company that credit or indulgence on payment was allowable, but the terms that, after thirty days' delay, a health certificate is required is not binding on the insured, who is not shown to have had knowledge of it, and who (even if he had) might well rely upon the simple provision in the policy itself that the payment must be made "during life" and the assurance of the agent that if it was done it would be sufficient: *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717; *Insurance Co. v. Wilkinson*, 13 Wall. 222.

³²⁰ It is true in *Whitley v. Piedmont etc. Ins. Co.*, 71 N. C. 480, it is held that the representation of good health continues up to the consummation of the contract. There, the policy was not delivered till more than a month after the death of the insured, and the agent was ignorant of the condition of the insured. In the present case, the contract was consummated by the unconditional delivery of the policy acknowledging receipt of payment, and if that acknowledgment can be varied by the provision that the policy was not valid unless the premium was "actually paid during life," this condition was complied with. There was no suppression of information

or fraud, for the agent knew the condition of the insured when he received the premium. The authorities cited in Whitley's case, *supra*, do not support the construction sought to be placed on that opinion by the defendant. It would be contrary to every rule of construction to restrict the obligation of a promisor beyond the plain meanings of his words. On the contrary, the uniform rule of construction of insurance policies is that if reasonably susceptible of two constructions, that one will be adopted which is more favorable to the insured: *National Bank v. Ins. Co.*, 95 U. S. 673.

In *Hoffman v. Aetna etc. Ins. Co.*, 32 N. Y. 413, 88 Am. Dec. 337, the rule is laid down by the New York court of appeals as follows: "It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee: *Potter v. Ontario etc. Ins. Co.*, 5 Hill, 147, 149; *Barlow v. Scott*, 24 N. Y. 40. It is also a familiar rule of law that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee: *Coke on Littleton*, 183; *Bacon's* 321 *Law Maxims*, Teg. 3; *Doe v. Dixon*, 9 East, 16; *Marvin v. Stone*, 2 Cow. 806. This rule has been very uniformly applied to conditions and provisos in policies of insurance on the ground that, though they are inserted for the benefit of the underwriters, their office is to limit the force of the principal obligation."

In *Goodwin v. Provident Assur. Soc.*, 97 Iowa, 226, 59 Am. St. Rep. 411, the supreme court of Iowa states the rule as follows: "The tenets established for the guidance of the courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a clear necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted." The court cites a large number of authorities to sustain the proposition, and indeed the authorities seem uniform.

Besides, the agent of the company put the same construction upon the policy and said that it would be sufficient if

the payment was made "during lifetime," and if this had misled the insured it would have been fraud for the company to avail itself of a forfeiture thus procured: *McMaster v. New York Life Ins. Co.*, 78 Fed. Rep. 36; *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304. The agent directed the "check to be mailed," and the time of the mailing was the time of payment (the check being honored on presentation): *Whitley v. Piedmont etc. Ins. Co.*, 71 N. C. 480.

Every phase of the defendant's contention could be and was presented without prejudice under the issue submitted by the court, and therefore the refusal to submit other issues, though asked, is not error: *Pretzfelder v. Merchants' Ins. Co.*, 123 N. C. 164.

Affirmed.

INSURANCE—RECITALS OF PAYMENT IN THE POLICY—ESTOPPEL.—Where an insurance policy contains a formal receipt of the premium, its unconditional delivery is conclusive evidence of payment so as to estop the company from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233; *Southern Life Ins. Co. v. Booker*, 9 Helsk. 606, 24 Am. Rep. 344; *Kline v. National Ben. Assn.*, 111 Ind. 462, 60 Am. Rep. 703. But see *Sheldon v. Atlantic etc. Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 213.

INSURANCE—POWERS OF AGENTS—INSTRUCTIONS TO AGENTS.—Private instructions to an agent limiting his authority cannot bind persons having no knowledge thereof: *Brown v. Franklin etc. Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534; *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. Rep. 376. An insurance company may limit the power of its agent, and when such notice as a prudent man is bound to regard is brought home to the assured, limiting the power of such agent, he relies upon any act in excess of such limited power at his peril: *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809. The insured is bound by limitations upon the power of the agent contained in his policy: *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908.

INSURANCE—CONSTRUCTION OF POLICY.—When the terms of a policy permit more than one construction, that will be adopted which will support its validity and favor the insured: *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 68 Am. St. Rep. 49; *Matthews v. American etc. Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627; *Goodwin v. Provident etc. Assur. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411.

CONTRACTS—CONSTRUCTION OF.—If a written contract reasonably admits of two constructions, that is to be adopted which is least favorable to the party whose language it is: *Amory Mfg. Co. v. Gulf etc. Ry. Co.*, 89 Tex. 419, 59 Am. St. Rep. 65. If the terms of an instrument are not ambiguous, the testimony of the parties as to how they understood it is inadmissible: *Pratt v. Prouty*, 104 Iowa, 419, 65 Am. St. Rep. 472.

GORRELL v. WATER SUPPLY COMPANY.

[124 NORTH CAROLINA, 328.]

CONTRACT FOR BENEFIT OF THIRD PARTY—RIGHT OF ACTION.—One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach.

CONTRACT FOR BENEFIT OF THIRD PARTY—BENEFICIARY ONE OF A CLASS—ACTION.—One not a party to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach, even when he is only one of a class of persons, if the class is sufficiently designated.

WATER COMPANIES—BREACH OF CONTRACT—NATURAL AND PROXIMATE RESULT—DAMAGE BY FIRE TO TAXPAYER.—Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by a citizen and taxpayer by the destruction of buildings, by the failure to so furnish water, is a natural and proximate consequence of such breach of the undertaking.

CONTRACT FOR BENEFIT OF THIRD PARTY—RIGHT OF ACTION FOR BREACH.—The beneficiaries of a contract, who furnish the consideration money of the contract, can maintain an action for damages caused by its breach.

DECISIONS OF SISTER STATES—WEIGHT OF.—In a case of first impression in a state, the decisions in other states have only persuasive authority, and the consideration to which the reasoning therein is entitled.

King & Kimball, for the defendant.

Boyd & Brooks, for the plaintiff.

328 CLARK, J. This cause is presented upon complaint and demurrer. The complaint avers authority conferred upon Greensboro by its charter to provide water supplies, either by erecting waterworks itself or by contract, and that, ³²⁹ in pursuance thereof, the city contracted with the Greensboro Water Company to furnish said city "with pure and wholesome water for the use of its citizens and of force at all times sufficient to protect the inhabitants of the city against loss by fire," giving to said company exclusive rights of eminent domain over its streets, alleys, sidewalks, and public grounds for the purpose of laying and operating water mains, pipes, hydrants, stands, et cetera; that subsequently all the rights and property of said water company passed by sale to the defendant, who at the same time assumed all the duties and obligations imposed by the aforesaid contract, and both the defendant and the city had acquiesced in the same; that by virtue of said contract it was stipulated and agreed inter alia that the water company should

“supply the city and inhabitants with pure, good, and wholesome water, suitable for all domestic, sanitary, and fire purposes, and for individual use”; should “erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump-houses and other appurtenances and attachments necessary or expedient for the proper conducting and carrying on said waterworks, so as to afford at all times the most adequate supply for all domestic uses and the greatest protection against fire.” The remainder of the complaint is as follows:

8. That it was also stipulated and agreed by and under said contract that the said water company should use only first-class machinery, pipes, hydrants, valves, pumps, et cetera, in connection with said waterworks, and that the said works should be complete in all its details with a capacity to furnish one and a half million gallons of water every twenty-four hours against a pressure of two hundred feet head. And should erect a storage water tank whose top water level should be one hundred feet above the surface of the ground at the center of the public square and to be of a capacity of one hundred thousand ³³⁰ gallons of water, and that the same shall be filled by the said water company to its top every day an hour before sundown. And for the extinguishment of fire in said city the company shall erect a pump-house and put therein a pumping engine, which shall be kept ready at all times to supply the needed fire pressure.

9. That it was further stipulated and agreed by and under said contract that the said water company should erect and put in seventy-five hydrants, at such places as the city might designate, and for the rents of which said city of Greensboro was to pay them annually two thousand eight hundred and seventy-five dollars. And in pursuance of such agreement and compliance therewith on the part of the city, the water company did erect, and their successors, the Greensboro Water Supply Company, had in possession and use at the times hereinafter mentioned, two hydrants—one a hundred and the other about two hundred feet distant from plaintiff's storehouses, which were destroyed by fire on the date hereinafter mentioned.

10. That by the terms of said contract it was further stipulated and agreed that the said water company should keep a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants, to a vertical height of one hundred feet in still air, each stream being taken from one hydrant and with one hundred feet of hose and a one-inch ring nozzle, and

the said company shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire service and shall keep them in good order for said service.

11. That said contract was made with the said Greensboro Water Company and extended to and acquiesced in by their successors, the defendant Greensboro Water Supply Company, for the use and benefit of all its property owners and inhabitants—among which was the plaintiff, who was a ³³¹ property owner in said city, at the times hereinafter referred to and for several years prior thereto, in common with that of other citizens of said city, which said property was taxed at its full value to raise money with which to pay said hydrant rents.

12. That on the night of the ——— day of June, 1897, a fire broke out in a building some thirty feet distant from plaintiff's storerooms on the south side of South Elm street in said city; that the fire alarm was at once turned on, and in less than ten minutes thereafter the Greensboro Fire Company arrived at said fire with their hose, fire engine, and other appurtenances necessary for the ready extinguishment of said fire. That the said fire company attached its hose, which were in every respect adequate and sufficient for the demands of the occasion, as plaintiff is advised and believed, to the two hydrants above mentioned, one one hundred feet from said storerooms and the other about two hundred feet distant, each of which said hydrants were sufficiently near to said store and lot to have afforded water adequate for the ready extinguishment of said fire, if the proper pressure had been on same.

13. That notwithstanding the promptness of the fire company in reaching said fire and the perfect sufficiency of its equipments to convey the water to same, the defendant, as plaintiff is advised and believes, persistently, carelessly, and negligently refused to furnish said hydrants above described and referred to with a sufficient pressure of water to extinguish said fire, and by reason of such tortious and negligent conduct on the part of the defendant the said fire spread from the building in which it originated and ignited the storeroom of the plaintiff.

14. That after the fire had spread to and caught on flames the building of the plaintiff, the said fire company, as plaintiff is advised and believes, was still present with its hose, ladders, buckets, engine, et cetera, ready to use its every effort to ³³²

extinguish same, and while the said fire company had its hose attached to said hydrants sufficiently near, with the proper pressure, to have quickly extinguished same and saved plaintiff's property from burning, the defendant persistently refused, neglected, and omitted to have the fire pressure agreed to and required by its contract, and only furnished pressure sufficient to throw a stream ten feet from the end of said regulation hose, by carelessly, negligently, and wrongfully failing to keep any water in its water tank, or even its hydrants and pipes full, and not having its pumping engine at work; by reason of which negligent, wrongful, and tortious conduct on the part of the defendant, the plaintiff's property was totally destroyed by fire, and by reason of such loss she has been damaged in the sum of five thousand dollars.

15. That the said fire originated in an adjacent building to plaintiff's, and that the destruction of her property by same was not occasioned by any mistake, carelessness, or negligence on her part, but solely on account of the careless, willful, and wanton neglect on the part of the defendant to furnish the hydrants above referred to with the water which they were required, and had obligated themselves to do, and upon their doing of which plaintiff confidently relied.

16. That as plaintiff is advised and believes, defendant's failure to provide sufficient water for the extinguishing of said fire was not occasioned by any unavoidable accident or lack of water in the reservoir from which they originally take same, but was the result of a wanton, careless, and willful neglect and disregard for their duties and obligation contracted and owed to the several inhabitants of the city of Greensboro, including the plaintiff.

Wherefore plaintiff demands judgment against the said Greensboro Water Supply Company for the sum of five thousand dollars damages and the cost of this action. And for such other and further relief as the court may deem plaintiff entitled to.

333 The demurrer admits the allegations of the complaint to be true. Those grounds of demurrer which allege omission of technical or formal averments in the complaint we deem not well taken, and to require no discussion. The demurrer, so far as it relates to the merits of the case is substantially that the complaint has stated no cause of action: 1. Because the plaintiff, though a citizen and taxpayer of Greensboro (as alleged

in the complaint), is neither a party nor privy to the contract, the breach of which is the foundation of the action; 2. The failure of the defendant to furnish water was not the proximate cause of the plaintiff's loss.

It is true the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease, and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges, benefits, and payments made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with adequate supply of water and the protection of their property from fire was the largest duty assumed by the company. One not a party or privy to the contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere: *Ellis v. Harrison*, ³³⁴ 104 Mo. 270; *Lawrence v. Fox*, 20 N. Y. 268; *Simson v. Brown*, 68 N. Y. 355; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Wright v. Terry*, 23 Fla. 160; *Austin v. Seligman*, 18 Fed. Rep. 519; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541; and even when the beneficiary is only one of a class of persons, if the class is sufficiently designated: *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 57 Am. Rep. 249. It was considered, though without decision, by this court in *Haun v. Burrell*, 119 N. C. 544, 548, and *Sams v. Price*, 119 N. C. 572. Especially is this so when the beneficiaries are the citizens of a municipality whose votes authorized the contract and whose taxes discharge the financial burdens the contract entails. The officials who execute the contract are technically the agents of the corporation, but the corporation itself is the agent of the people, who are thus effectively the principals of the contract. The acceptance of the contract by the water company carries with it the duty of supplying all persons along its mains: *Griffin v. Goldsboro Water Co.*, 122 N. C. 206; *Haugen v. Albina Water Co.*, 21 Or. 411.

In *Paducah Lumber Co. v. Paducah Water Supply Co.* (1889), 89 Ky. 340, 25 Am. St. Rep. 536, it is held: "If a water company enter into a contract with a municipal corporation whereby the former agrees, in consideration of the grant of a franchise and a promise to pay certain specified prices for the use of hydrants, to construct waterworks of a specified character, force, and capacity, and to keep a supply of water required for domestic, manufacturing, and fire protection purposes for all the inhabitants and property of the city, a taxpayer of the city may recover of the water company when, through a breach of its contract, he is left without means of extinguishing fire and his property is on that account destroyed," and it is therein further held: "Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so ³³⁵ furnish such water is a natural and proximate consequence of such breach of the undertaking." This opinion is based upon sound reason and is adopted by us. It is conclusive of both points raised as to the merits of the controversy by the demurrer. Indeed, it could not be doubted that if the city buildings were destroyed by fire through failure of the defendant to furnish water for their protection as provided by the contract, the city could recover: *New Orleans etc. Co. v. Meridian Waterworks*, 72 Fed. Rep. 227. Besides, the complaint, in paragraphs 13 and 14, alleges that the defendant's failure to furnish water as per contract was the direct and sole cause of the loss, and this is admitted by the demurrer. This, the question really narrows down to the question whether the beneficiaries of a contract, who furnish the consideration money of the contract, can maintain an action for damages caused by its breach.

The case of *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, is exactly in point, was reaffirmed on rehearing, and is followed by *Duncan v. Owensboro Water Co.* (Ky., Dec. 10, 1889), in the same court, making three decisions altogether. The decisions, however (twelve in number), in other states where the question has been presented, are the other way. But this is a case of the first impression in this state, and decisions in other states have only persuasive authority. They have only the consideration to which the reasoning therein is entitled. They are to be weighed, not counted. We should adopt that line which is most consonant with justice and the "reason of the thing."

Did the people of Greensboro have just cause to believe that, by virtue of that contract, they, as well as the corporation, were guaranteed a sufficient quantity of water to protect their property from fire, and did the water company understand it was agreeing, for the valuable considerations named, to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be ³³⁶ drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when, by breach of that contract, private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he, and he alone, can maintain an action for his loss.

As is said by Judge Freeman, the learned annotator of the American State Reports, in commenting on the fact (*Britton v. Green Bay etc. W. W. Co.*, 29 Am. St. Rep. 863) that the majority of decisions so far rendered were adverse to the position taken in the Kentucky case above cited and approved by us: "As none of the courts have fairly faced what seems to be the logical result of these decisions, viz., that the injured person is left without any remedy at all, it must be admitted that the subject is left in an extremely unsatisfactory position. It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of taxpayers from fire, unless made liable by express statutory provisions: *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256. And it seems equally clear that the city would have no right of action in such case in behalf of the taxpayer, for the basis of all the [adverse] decisions is that there is no privity of contract between the taxpayers, and the water companies. If the contract is not made for the benefit of the taxpayers in such a sense that they can sue upon it, it can hardly be maintained that the same contract is made for one of those taxpayers in such a sense that the city can recover damages in his name. . . . If, then, neither the taxpayer himself nor the city on his behalf can sue the company, the conclusion seems to be that the loss by fire in these cases is regarded by the law as damage for which there is no redress." This is a complete reduction ad absurdum, and we prefer not to ³³⁷ concur in cases, however numerous—there are probably a dozen scattered through half a dozen states—which lead to such conclusion. All these cases (when not based on reference to the

others) rest upon the narrow technical basis that a citizen, because not a privy to the contract, cannot sue, whereas authorities are numerous that a beneficiary of a contract, though not a party or privy, may maintain an action for its breach: 7 Am. & Eng. Ency. of Law, 2d ed., 105-108. Here, the water company contracted with the city to furnish certain quantities of water for the protection of the property of the citizens as well as of the city, and receive full consideration, a large part of which comes in the shape of taxation, paid annually by those citizens. On a breach of the contract, whereby the property of a citizen is destroyed, he, as a beneficiary of the contract, is entitled to sue, and under our code, requiring the party in interest to be plaintiff, he is the only one who can.

Whether there was a breach of the contract, and whether it was the proximate cause of the loss, regarded as matters of fact, will be determined by the jury, if, when the case goes back, the defendant shall file an answer, as it has a right to do (Code, sec. 272) raising those issues. But in overruling the demurrer to the complaint there was no error. As was said by the supreme court of Kentucky, when affirming, on a petition to rehear, the decision in the Paducah case, *supra*: "The water company did not covenant to prevent occurrence of fires nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the stand-pipe, and if it failed or refused to comply with that undertaking, and such breach was the ³³⁸ proximate cause of destruction of the plaintiff's property, which involves issues of fact for determination by a jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract."

Affirmed.

* Faircloth, C. J., and Furches, J., dissent.

CONTRACT FOR BENEFIT OF THIRD PARTY—RIGHT OF ACTION.—If a contract has been made between two parties for the benefit of a third, an action will lie thereon at the instance and in the name of the party to be benefited, although the contract was made without his knowledge, and without any consideration moving from him: *Brown v. Markland*, 16 Utah, 360, 67 Am. St. Rep. 629; *St. Louis v. Von Phul*, 133 Mo. 561, 54 Am. St. Rep. 695, and note.

WATER COMPANIES—BREACH OF CONTRACT—NATURAL AND PROXIMATE RESULT.—Where a party undertakes to fur-

nish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking: *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536.

WATER COMPANIES—CONTRACT WITH MUNICIPALITY—TAXPAYER'S RIGHT OF ACTION.—If a contract is made between a municipality and a corporation that the latter will furnish water for the extinguishment of fires and other purposes, a private citizen cannot recover of such corporation for damages sustained by him for the breach of its contract with the city: *Fitch v. Seymour etc. Co.*, 139 Ind. 214, 47 Am. St. Rep. 258; *Britton v. Green Bay etc. W. W. Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, and especially the note thereto; *Howsmen v. Trenton etc. Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, and note. *Contra*, *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536.

BALK v. HARRIS.

[124 NORTH CAROLINA, 467.]

TAXATION—SITUS OF A DEBT.—The situs of a debt for purposes of taxation, and usually for all purposes, is with the creditor.

ATTACHMENT—GARNISHMENT—SITUS OF DEBT.—In North Carolina, the situs of a debt for purposes of an attachment is where the debtor resides.

ATTACHMENT—NONRESIDENT GARNISHEE—JURISDICTION.—As a general rule, the courts of a state cannot, by their service of process upon an inhabitant of another state transiently within their jurisdiction, charge such person as garnishee.

ATTACHMENT—WHEN NONRESIDENT MAY BE CHARGED AS GARNISHEE—JURISDICTION.—The courts of a state can charge a nonresident debtor, transiently within their jurisdiction, as garnishee, if he has in his possession money or property of the defendant, or if he has contracted to pay money or deliver property within such jurisdiction.

ATTACHMENT—GARNISHMENT—JURISDICTION.—A court entertaining a garnishment must have some jurisdiction over the thing garnished, and where the garnishee is a nonresident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within that state, the jurisdiction is defeated.

ATTACHMENT—GARNISHMENT—JURISDICTION OF ACTION.—Since an attachment is in effect a proceeding by the principal debtor in the name of the plaintiff against the garnishee, the action must be brought where the garnishee resides, for it is there that his creditor must have sued him.

Charles F. Warren for the petitioner.

John H. Small, contra.

468 CLARK, J. This is a petition to rehear the decision reported in *Balk v. Harris*, 122 N. C. 64. The judgment of

another state condemning the debt due by Harris to Balk can only be recognized as valid here when that court acquired jurisdiction. It was not founded on personal services, but it is contended that the Maryland court acquired jurisdiction by attaching the debt due Balk by serving notice upon Harris, who was transiently in the city of Baltimore. The situs of the debt for purposes of taxation, and usually for all purposes, is with the creditor. But there are many states whose courts hold that for the purposes of attachment the situs of the debt is at the residence or domicile of the debtor. The conflicting authorities are summed up and arrayed in the notes to *Illinois Cent. R. R. Co. v. Smith*, 70 Miss. 344, 35 Am. St. Rep. 651, whose accomplished editor sums up a careful review of the authorities as follows: "The true doctrine seems to us to be that no jurisdiction can be obtained to condemn a debt due to a nonresident unless jurisdiction of his person is obtained, that is, that the situs of debt for the purpose of garnishment is at the residence of the creditor. To hold that such situs is with the debtor seems against reason because he has no property in the debt, and because it allows a proceeding to condemn one's property to be prosecuted without notice to him, or representation by anyone who cares for the protection of his interests. Such a proceeding seems unworthy to be called due process of law." There is logic and force in these views if it were an open question with us, but North Carolina is one of the states whose courts have held that for purposes of an attachment the situs of a debt is where the debtor resides: *Cooper v. Adel Security Co.*, 122 N. C. 463; *Winfree v. Bagley*, 102 N. C. 515.

The apparent inconsistency or hardship of such ruling is much lessened by the uniform holding by courts of that ⁴⁶⁹ line of thought that the attachment of the debt can only be made where the debtor resides, and can have no validity if levied upon him when only passing through or transiently in another state. It is thus stated in 8 *American and English Encyclopedia of Law*, 1129, 1130: "Choses in action upon which the garnishee is liable are not to be considered as following the former wherever he may be transiently found, to be there taken, at the will of a third person, within a jurisdiction where neither such debtor nor his creditor resides. As a general rule, therefore, the courts of a state cannot, by their service of process upon an inhabitant of another state transiently within their jurisdiction, charge such person as garnishee. But if, when so served, the garnishee have in his possession, within the state, money or property of the

defendant, or has contracted to pay money or deliver property within such jurisdiction, he may be charged." This is sustained by uniform decisions (many of which are there stated in the notes); among many others, *Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746; *Lovejoy v. Albee*, 33 Me. 415, 54 Am. Dec. 630; *Sawyer v. Thompson*, 24 N. H. 510; *Baxter v. Vincent*, 6 Vt. 614; *Ray v. Underwood*, 3 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Cronin v. Foster*, 13 R. I. 196. In the last case it is said: "When a person transiently in another state is sued for his own debt, it is a different case. But if a person by garnishment is compelled, in order to satisfy a debt not his own, but due from one of his creditors, to pay his own debt in a mode very different from that in which he would otherwise have paid it, it would be a hardship." The court, proceeding, admits the recognized exceptions above stated that the foreign court could acquire jurisdiction by service upon a garnishee transiently within the state: 1. When the garnishee has personal chattels of the debtor with him (which usually could be attached without garnishment); and 2. When the debt due by ⁴⁷⁰ the garnishee is contracted to be paid within the state. Among other cases to same effect, *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175, 56 Am. Rep. 747, in which it is said: "The rule is well settled that garnishment served upon a nonresident of the state, but temporarily within it, is not effectual as an attachment"; citing to same purpose *Green v. Farmers' etc. Bank*, 25 Conn. 452; *Casey v. Davis*, 100 Mass. 124; *Sawyer v. Thompson*, 24 N. H. 510; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Nye v. Liscombe*, 21 Pick. 263; *Tingley v. Bateman*, 10 Mass. 343; *Jones v. Winchester*, 6 N. H. 497; *Mathews v. Smith*, 13 Neb. 190; *Danforth v. Penny*, 3 Met. 564; *Gold v. Housatonic R. R. Co.*, 1 Gray, 424. In *Bush v. Nance*, 61 Miss. 237, it is said that unless the debt of the nonresident garnishee was payable in the state where garnished, "he was not subject to garnishment in that state, and the writ served on him there was a nullity, and this seems settled law by the authorities. The reason is, that the court entertaining a garnishment must have some jurisdiction over the thing garnished, and where the garnishee is a nonresident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within that state, the jurisdiction is defeated. Such is the well-settled law: *Drake on Attachment*, 5th ed., secs. 474, 475, and cases there cited." This is sustained by reference to the citation from *Drake on Attachment*, and also

by Waples on Attachment, 228. There are many other cases to same effect, among them Squair v. Shea, 26 Ohio St. 645; Mobile etc. R. R. Co. v. Barnhill, 91 Tenn. 395, 30 Am. St. Rep. 889; Commercial Nat. Bank v. Chicago etc. R'y Co., 45 Wis. 172. The defect being jurisdictional, the garnishee cannot waive it "because it is not with him a personal matter, and he has no right to prejudice the defendant: Rindge v. Green, 52 Vt. 204; Waples on Attachment, 228; Drake on Attachment, sec. 476.

471 Inasmuch as an attachment is in effect a proceeding by the principal debtor (the defendant in the action) in the name of the plaintiff against the garnishee, it is thus properly held, even in those courts which hold that the situs of a debt for this purpose is with the debtor (garnishee), that the action must be brought where he "resides" or "has his domicile," since it is there that his creditor must have sued him. One or two cases unguardedly say the action may be brought "wherever the debtor (garnishee) may be found," but the context and the facts in those cases show that they mean where he may be found "resident" or "domiciled" as it is expressly held in all cases where the point is made. As, upon the uniform authorities above cited and others not necessary to cite, the Maryland court acquired no jurisdiction as against Balk by service of notice upon his debtor, Harris, who had no tangible property of Balk's in his possession, and was not resident in that state, we reaffirm our former decision, but after the benefit of the able and exhaustive argument upon the rehearing, for an entirely different reason from that given on the first hearing.

Petition dismissed.

ATTACHMENT—GARNISHMENT—SITUS OF DEBT.—A debt has no situs for the purpose of garnishment in a state of which the plaintiff, the defendant, and the garnishee are all nonresidents, although the latter is a foreign corporation which, by general provisions of a state statute, is subject to garnishment in such state: Morawetz v. Sun Ins. Office, 96 Wis. 175, 65 Am. St. Rep. 43. It is held in some jurisdictions that garnishment proceedings must be instituted in the state where the debt is payable, or the property is to be delivered, and a garnishment in one state of a debt due and payable in another is void: American etc. Ins. Co. v. Hettler, 37 Neb. 849, 40 Am. St. Rep. 522. In other jurisdictions it is held that though the situs of intangible personality may be at the domicile of the creditor for the purpose of taxation or distribution, yet for the purpose of collecting a debt it is ambulatory, accompanying the person of the debtor, and may be attached wherever he may be found: Neufelder v. German etc. Ins. Co., 6 Wash. 336, 36 Am. St. Rep. 166, and note; Wyeth etc. Co. v. Lang, 127 Mo. 242, 48 Am. St. Rep. 626. Under such holdings, a debtor may at the same

time be subject to garnishment in two or more states: *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 56 Am. St. Rep. 275, and note. See the monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 113.

BROADFOOT v. FAYETTEVILLE.

[124 NORTH CAROLINA, 478.]

MUNICIPAL CORPORATIONS—REPEAL OF CHARTER—EFFECT ON DEBTS.—Debts due from a municipal corporation are not extinguished by the repeal of its charter, and still exist notwithstanding that repeal.

MUNICIPAL CORPORATIONS—WHEN A NEW CORPORATION IS THE SUCCESSOR OF AN OLD ONE.—Where the old charter of a municipal corporation has been repealed, and a new one, creating a new corporation, has been granted, the new corporation, embracing the same territory, the same inhabitants and the same taxable property, is considered as the successor of the old.

MUNICIPAL CORPORATIONS—LIABILITY OF NEW CORPORATION FOR DEBTS OF OLD.—When the old charter of a municipal corporation is repealed and a new one is granted, upon which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new; where the benefits are taken, the burdens are assumed.

MUNICIPAL CORPORATIONS—LIABILITY OF SUCCESSOR OF OLD CORPORATION—CONSIDERATION.—The foundation on which the liability of a new municipal corporation for the debts of the old rests, is that the new corporation embraces the same territory, the same corporators, the same taxable property, and has received the property of the old corporation without consideration; and for these benefits must, in return, bear the burdens of the old corporation.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—STATUTES PROHIBITING PAYMENT OF DEBTS OF OLD CORPORATION.—A statute expressly prohibiting a municipal corporation from assuming the debts of its predecessor, or from paying any part of them, is unconstitutional.

LEGISLATURE—POWER TO TAX—LIMITATION.—The legislative power of taxation is subject to the qualification that it must not be exercised to impair the obligation of contracts.

MUNICIPAL CORPORATIONS—REMEDIES OF CREDITORS—POWER OF LEGISLATURE.—The remedies of a creditor for the enforcement of his debt assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or, if they are changed, a substantial equivalent must be provided.

MUNICIPAL CORPORATIONS—BONDS—POWER TO TAX FOR PAYMENT OF.—Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds, is forbidden by the constitution of the United States, and is null and void.

MUNICIPAL CORPORATION—BONDS—PAYMENT BY NEW CORPORATION—STATUTE PROHIBITING.—Where a municipal corporation has issued bonds, and before their payment its charter has been repealed and a new corporation formed, a statute which prohibits the levying of taxes for the payment of the bonds by the new corporation is invalid and cannot be regarded.

MUNICIPAL CORPORATIONS—TAXATION—MANDAMUS TO COMPEL.—Where statutes have been passed, abrogating or restricting the power of taxation delegated to a municipality upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, a party interested may by mandamus compel the exercise of that power as if no legislation had ever been attempted.

BONDS—COUPONS OR INTEREST—NATURE.—Coupons attached to bonds, being for interest to become due on such bonds, are a part of them and partake of their nature.

LIMITATIONS OF ACTIONS—COUPONS ATTACHED TO BONDS.—The statute of limitations which applies to bonds applies to coupons attached thereto, when such coupons are for interest to become due on the bonds.

LIMITATIONS OF ACTIONS—WHAT WILL STOP RUNNING OF STATUTE.—The general rule is, that when the statute of limitations once begins to run no subsequent happening or event can obstruct its course.

LIMITATIONS OF ACTIONS—WHAT WILL STOP RUNNING OF STATUTE.—The statute of limitations ceases to run against a claimant whose power to institute his suit has been taken away by statute, whether such exception is contained in the act of limitation or not.

N. W. Ray and H. McD. Robinson, for the appellant:

R. P. Buxton and J. C. and S. H. MacRae, for the plaintiff.

483 MONTGOMERY, J. Under the provisions of an act of the general assembly of the session of 1881, the charter of the town of Fayetteville was surrendered and repealed. At its session in 1883 the general assembly created a taxing and police district out of the territory included in the boundaries of the old town of Fayetteville, the taxing and police district to be called Fayetteville. Under the last-mentioned act, all of the property of the former town of Fayetteville was transferred to the custody and control of the board of commissioners appointed by the general assembly. The public buildings, streets, and squares and the policing of the same were placed under the charge of those commissioners. Taxes were levied by the general assembly with a specification as to the purposes to which they were to be applied. The general assembly, at its session of 1893, incorporated the inhabitants within the old territory of the town of Fayetteville under the name of the city of Fayetteville.

The plaintiff in 1880 and 1881, being the owner of fifty-two coupons cut from bonds executed by the town of Fayetteville,

presented the same for payment, and, upon payment being refused, brought two actions against the town of Fayetteville to recover the amounts due on the coupons. Judgments were rendered at August term, 1882, of Cumberland superior court in the two actions in favor of the plaintiff, but between the time of action begun and judgment rendered the charter of the then defendant, the town of Fayetteville, was surrendered and repealed.

The complaint in the present action embraces three causes of action. The first is founded upon the judgments procured in 1882 by the plaintiff against the town of Fayetteville; the ⁴⁸⁴ second upon the coupons themselves, upon which the judgments were procured, and the third upon the plaintiff's alleged right to have the two cases against the town of Fayetteville, which were pending in the superior court of Cumberland county, at its August term, 1882, reinstated on the civil issue docket, brought forward and consolidated into one action, and judgment rendered therein for the amount due on the fifty-two coupons mentioned in those actions. The plaintiff's allegations are that the judgments against the town of Fayetteville, or the coupons, if the judgments are invalid, are still due; that although the charter of the old town of Fayetteville was repealed and surrendered under the act of 1881, yet the act incorporating the city of Fayetteville rehabilitated the old town of Fayetteville, and that the city is the successor of the old town, and therefore liable to the plaintiff for the amount of the coupons.

The defendant admits the repeal of the charter of the town of Fayetteville, that the coupons have never been paid, that the judgments were entered against the town of Fayetteville after its charter had been surrendered, and that the inhabitants of the old town have been incorporated by the act of 1893 under the name of the city of Fayetteville. The defendant avers, however, that the judgments procured by the plaintiff against the town of Fayetteville were void and denies that the city of Fayetteville is the successor of the old town of Fayetteville, or liable on the coupons or on the judgments.

It is of the first importance then to consider whether the city of Fayetteville, the new corporation, chartered by the act of March, 1893, is so far the successor of the town of Fayetteville, the old corporation, as to be liable for its debts. If this question is answered in the affirmative, the statutes of limitation set up in the answer, as a defense to the action, ⁴⁸⁵ will then have to be discussed and decided. This court at one time adopted the

old common-law rule, that upon the civil death of a corporation, the grantors of its real estate took it by reversion, and the debts due to and from it were extinguished: *Fox v. Horah*, 36 N. C. 358, 36 Am. Dec. 48. This rule was changed by the court in the case of *Wilson v. Leary*, 120 N. C. 90, 58 Am. St. Rep. 778, and that of *Fox v. Horah*, 36 N. C. 358, 36 Am. Dec. 48, was overruled. The debt then due to the plaintiff by the town of Fayetteville was not extinguished by the repeal of its charter, and still exists, notwithstanding that repeal: *Meriwether v. Garrett*, 102 U. S. 472; *Wolff v. New Orleans*, 103 U. S. 358; *Mobile v. Watson*, 116 U. S. 289; *O'Conner v. Memphis*, 6 Lea, 730.

Apparently, each corporation created by a separate charter is a distinct entity, and from this it may be argued with plausibility that no two successive corporations can be connected unless they are connected by the terms of the act which created them. But that view must be often only apparently true. If, in the case of a municipal corporation, the old charter should be repealed and a new one granted, and the new one should include the same territory, substantially the same people, and the great mass of the taxable property of the old corporation, and the property of the old corporation used for public purposes be passed over to the possession and control of the new corporation without consideration from the new corporation, it would be difficult to appreciate how the property and the benefits of the old corporation could be received by the new one without the shouldering of its responsibility by the new one. It must be that the creditors of a defunct municipal corporation, whose money and property have helped to build up and improve the wealth and influence of the old corporation (although they must submit when a charter is absolutely abolished, and while the old territory and people remain unincorporated) have the right in equity to have a new corporation, embracing the same territory and ⁴⁸⁶ the same inhabitants and the same taxable property, considered as the successor of the old, at least so far as its liabilities for the debts of the old corporation are concerned. When the old charter is repealed and a new one is granted, upon which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new; where the benefits are taken, the burdens are assumed.

So strong has this view been impressed upon the courts that in *O'Conner v. Memphis*, 6 Lea, 730, the court said: "But in no case have the courts ever failed to declare the identity or suc-

cession or continuity of the two corporations where the same corporators and the same corporate property have passed to the new corporation. The terms of the charter have in such cases never been construed otherwise."

The same doctrine was laid down in *Mount Pleasant v. Beckwith*, 100 U. S. 514; in *Broughton v. Pensacola*, 93 U. S. 266; in *Wolff v. New Orleans*, 103 U. S. 358; and in *Mobile v. Watson*, 116 U. S. 289. The acts of the legislature repealing the old charters of the cities of Memphis and Mobile, and incorporating those cities, were passed on the same day, and it might be inferred that these acts were considered as one and the same in legislative intent. But in the case of *Amy v. Selma*, 77 Ala. 103, cited, indorsed and approved with high commendation by the supreme court of the United States, in *Mobile v. Watson*, 116 U. S. 289, the acts were not simultaneously passed. The repealing act was passed in December, 1882, and the reincorporating act in February, 1883. In that case the supreme court of Alabama held that the act repealing the charter of the city of Selma was without effect or operation upon the liabilities of the city of Selma; that the act of February, incorporating the inhabitants and territory formerly embraced within the limits of the city of Selma, was a reorganization under the corporate name of Selma, of the same corporators, and ⁴⁸⁷ embraced substantially the same territory as the city of Selma; that Selma was the successor of the city of Selma, and liable for the payment of its debts.

It appears also, in the case of *Broughton v. Pensacola*, 93 U. S. 266, that the repeal of the charter of Pensacola was under one act and the reincorporation of the city under the same name was under a different law.

In the case before us, twelve years elapsed between the repeal of the charter of the town of Fayetteville and the incorporation of the city of Fayetteville; but we cannot see how that can alter the principle involved in the case. The foundation on which the liability of the new corporation rests is that the new corporation embraces the same territory, the same corporators, the same taxable property, and has received the property of the old corporation without consideration; and for these benefits must, in return, bear the burdens of the old corporation. The liability in such a case commences from the receiving of the benefits, and whether those benefits were received one or ten years, or more, from the repeal of the old charter, makes no difference.

But it is argued for the defendant that even if the act of

1893 did have the effect to make the city of Fayetteville the successor of the old town of Fayetteville, yet the new corporation was not liable for the debts of the old corporation, but, on the other hand, was expressly prohibited from assuming the debts of the old town or from paying any part of them, except such as were provided for in the act of 1883, and the plaintiff claimed no benefit under that act. The position was without any citation of authority to support it, and to us it did not seem to be sound (and the authorities so far as they have been examined by us are all the other way). If the law was as is contended for by the defendant, then it would be in the power of the legislature to destroy the claims of creditors ⁴⁸⁸ against municipal corporations by simply repealing their charters on one day, and on the next reincorporating the same inhabitants in the same territory, taking care to insert in the repealing acts a provision to the effect that the new corporation should not be liable for the debts of the old. Such legislation would be contrary to every idea of justice and law, and obnoxious to the constitution of the United States, and to that of our own state.

In *Amy v. Selma*, 77 Ala. 103, it appeared that the act incorporating Selma authorized the proper officials to levy taxes, but declared that no funds derived by the corporation from the collection of taxes or from any other source should be used for the payment of any of the debts of the city of Selma, the old corporation; and, as we have seen, the supreme court of Alabama in that case held that the provision was inoperative against the debts and liabilities of the city of Selma, and the supreme court of the United States, in *Mobile v. Watson*, 116 U. S. 289, cited the decision with marked approval.

But the defendant further contends that even if it should be held by this court that the debts against the town of Fayetteville were not extinguished by the repeal of the town charter, and that they are valid and good against the city of Fayetteville, yet the officials of the new corporation are not only not authorized to levy taxes to pay those debts, but are prohibited from doing so by the very terms of the act of incorporation, and that "the power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature," as was said in *Merriwether v. Garrett*, 102 U. S. 472. That is a good proposition of law, and it was applicable to the condition of affairs which appeared in that case, as well as from the view of the law which that court took of the effect of the repeal of the charter of Memphis, and the one creating out of the same

territory a taxing district. That court held ⁴⁸⁹ that the charter of Memphis was absolutely repealed, and treated the case of *Merriwether v. Garrett*, 102 U. S. 472, upon that view. The effect of the act creating the taxing district was not directly before the court. We have seen that the supreme court of Tennessee in *Luehrman v. Taxing Dist.*, 2 Lea, 425, and *O'Connor v. Memphis*, 6 Lea, 730, held that the taxing district was a reorganization of the city of Memphis. But the act of the Tennessee legislature, creating the taxing district of Shelby, was a very different act from the act of the North Carolina legislature which created the taxing district of Fayetteville. The former conferred on the officers of the former extensive legislative and judicial powers, and provided that at the end of two years the district should be governed by officers of its own choice. No such powers were conferred on the officers of the taxing district of Fayetteville. But that the power of taxation which is vested in the legislature is such a power as the defendant contends for cannot be maintained. The power is subject to the qualification which attends all state legislation, that is, that it must not be exercised to impair the obligation of contracts, thereby conflicting with the constitution of the United States and of North Carolina. There is no doubt of the power of the legislature to repeal, out and out, a municipal charter, and there is no doubt that after the application of the property of the defunct corporation not necessary for public uses (public buildings, streets, squares, parks, promenades, wharves, landing-places, fire engines, hose and hose-carriages, engine-houses and engineering instruments, being property necessary for public uses, as is held in *Merriwether v. Garrett*, 102 U. S. 472, and not subject to the demands of creditors of the corporation) toward the payment of any remaining indebtedness, the debt cannot be enforced, although it is not extinguished. But as long as the charter is not repealed, or if repealed can be ⁴⁹⁰ rehabilitated so as to become the successor of the old and liable for its debts, the taxing power in the hands of the legislature cannot be used to decrease or impair the rights of the creditor in the enforcement of the collection of the debt. In reference to this matter it was said in the case of *Wolff v. New Orleans*, 103 U. S. 358: "This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control

of the legislature over the power of taxation, delegated to it, is restrained to cases where such control does not impair the obligation of contracts made upon a pledge expressly or impliedly given that the power shall be exercised for their fulfillment. However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts." The same doctrine is declared in *Mobile v. Watson*, 116 U. S. 289 (and many cases there cited), where it is said: "But when (municipal corporations) empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. Therefore, the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued ⁴⁹¹ any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the constitution of the United States, and is null and void."

Now, to apply the law as we have found it to be to the particulars of the case before us: Under what circumstances did the debt of the plaintiff against the town of Fayetteville arise, and what were the means provided at the time the debt was contracted for its payment? "The Western Railroad was incorporated by the general assembly of North Carolina, at its session of 1852, by chapter 147. By an act passed at the same session (chapter 207), the town of Fayetteville was authorized to subscribe for shares of stock in that railroad company, the shares of stock to be held for the use and benefit of the town. To meet the payment of any subscriptions that might be made, the town was authorized to issue and sell bonds bearing interest, and, by section 4, to levy and collect taxes for the payment yearly of the interest, and to create a sinking fund for the ultimate payment of the debt, and to invest from time to time, in profitable stock, the surplus of their taxes to meet the maturity of the bonds. An election was held according to the provisions of the act, and a majority of the qualified voters cast their ballots for

"subscription," and the bonds were issued. On the 22d of March, 1875, the general assembly of that year passed an act (chapter 248), in which the town of Fayetteville was authorized to fund the bonded debt of the town, contracted for stock of the Western Railroad Company by virtue of the act of 1852. The debt was funded, and the coupons on which this suit was brought are clipped from the bonds issued by the town under the funding act of 1875. It appears, then, from the above statement of the facts, that the bonds were originally issued by the town with the express provision in the act which authorized ⁴⁹² their issue (1852) that the town authorities were to levy and collect an annual tax upon the property and polls within the town, with which to pay the interest (coupons), and in the same way to raise a sinking fund to pay the bonds at maturity. The act of 1875, authorizing the town to fund the original bonds, provided for the payment of the new bonds in the same manner and to the like extent as were the old bonds.

It follows, then, from the conclusion at which we have arrived, aided as we have been by the decisions of other courts, that the act of 1852 was the basis of a contract between the holders of the bonds which were issued to buy the stock of the Western Railroad Company, and the town of Fayetteville, by which the town authorities were to levy a tax upon the property and polls of the town, with which to pay the coupons, and also to provide a sinking fund with which to pay the bonds at maturity; that the coupons upon which this suit was brought were clipped from the bonds issued under the act of 1875, under which the old bonds were funded; that the new bonds are of the same nature as the old bonds and were invested with the same security for their payment; that these bonds are still in force, and that the obligation to pay the same, together with the coupons (the interest), rests upon the city of Fayetteville as the legal successor of the town of Fayetteville.

The provisions in the act of 1893 incorporating the city of Fayetteville, which prohibit the levying of taxes for the payment of the bonds by the new corporation, are invalid and cannot be regarded. In support of this position we refer to the case of *Mobile v. Watson*, 116 U. S. 289: "All laws passed since the making of the contract whose purpose or effect is to take from the city of Mobile, or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded; to *Wolf v. New Orleans*, 103 U. S. 358, where the ⁴⁹³ court said: "The courts, therefore, treating as invalid and

void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed, and by mandamus compel, at the instance of parties interested, the exercise of that power as if no legislation had ever been attempted."

The conclusion at which we have arrived as to the liability of the city of Fayetteville, the new corporation, for the debts of the town of Fayetteville, the old corporation, makes it necessary for us to discuss and decide the question of the statute of limitations set up by the defendant in the answer as a bar to the action. The coupons being for interest, to become due on the bonds, are a part of the bonds and partake of their nature, and the statute of limitations, therefore, which applies to the bonds themselves must be the same statute which is applicable to the coupons. The bonds are specialties, and so are the coupons. The ten years statute begins to run against coupons from the time of their maturity: 8 Am. & Eng. Ency. of Law, 18; Clark v. Iowa City, 20 Wall. 583; Amy v. Dubuque, 98 U. S. 470; Koshkonong v. Burton, 104 U. S. 668. The coupons in this case became due in 1881; the charter of the town of Fayetteville was repealed in October, 1881; the city of Fayetteville was incorporated in March, 1893, and this action was brought in 1894. If the time which elapsed between the repeal of the charter of the town of Fayetteville and the act of 1893 which incorporated the city of Fayetteville, and during which time the territory was a taxing district, is to be counted, then the statute of limitations (ten years) will be a bar to the action; if that time is not to be counted, then the statute will not be a bar to the action. We are of the opinion that the time should not be counted. In Lilly v. Taylor, 88 N. C. 489, it was held that as a result of ⁴⁹⁴ the repeal of the charter of Fayetteville (and that too after the court had taken official knowledge of the act of 1883 creating the taxing district), the creditors of the town had had all remedies for coercing the payment of their debts taken from them; and by the reference of the court to the case of Merriwether v. Garrett, 102 U. S. 472, as decisive of the case before them, the court could have had no other idea than that the creation of the taxing district did not in any way or for any purpose revive the old corporation.

But the defendant insists that the statute of limitations began to run against the coupons in 1881 when they fell due, and that more than ten years elapsed between that time and the

time when this action was begun; and that when the statute once begins to run no subsequent happening or event can obstruct its course. That, as a general proposition of law, is true, and we have numerous decided cases in our own reports which lay down that rule in the clearest language. In *Hamilton v. Shepperd*, 7 N. C. 115, the plaintiff insisted that his action was not barred because there was fraud in the conduct of the defendant, but the court said: "But it [the matter on which the plaintiff relied to take his case out of the operation of the statute] is not in the act, nor is there anything like it, and we cannot put it there. It is neither in its letter nor spirit." In *Vance v. Granger*, 1 N. C. 204 (*71) the court said: "The act of limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso; we cannot add to these others which the legislature has omitted." But we are satisfied that when these decisions were made the court had in mind only cases where the ability to bring suit on the part of the plaintiff, or some one for him, had not been taken away by law—by statute—and where the courts were open for the hearing of all matters of which they had jurisdiction. Statutes of limitation are founded on the idea that one who has a cause of action will undertake to ⁴⁹⁵ enforce it within a reasonable time if the courts are open to him. To prevent confusion and to produce certainty as to what is reasonable time, the law (the statutes of limitation) has fixed the periods within which actions must be brought. These views are so well expressed in the case of *United States v. Wiley*, 11 Wall. 508, that we cannot do better than quote a part of the opinion in that case: "But it is the loss of the ability to sue, rather than the loss of the right, that stops the running of the statute. The inability may arise from a suspension of right, or from the closing of the courts; but, whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitation are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have." This view of the law is strengthened by what was said by the court in *Hanger v. Abbott*, 6 Wall. 532: "They (the statutes of limitation) proceed

also upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint because they rest on the negligence or laches of the party himself." These cases were approved in *Braun v. Sauerwein*, 10 Wall. 218, where it was said: "Similar decisions (referring to *Hanger v. Abbott*, 6 Wall. 532) have been made in the state courts. They all rest on the ground that the creditor has been disabled to sue by a superior power, without any default of his own, and therefore that none of the reasons, which ⁴⁹⁶ induced the enactments of the statutes, apply to his case; that unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue."

It is unnecessary to consider at any length the effect of the judgment which was entered up against the town of Fayetteville after the charter of the town of Fayetteville had been repealed. For the purposes of this case we will treat it as void, as was contended by the defendant. The second cause of action founded on the coupons is good.

In conclusion, we are of the opinion that the city of Fayetteville, the new corporation, is the successor of the town of Fayetteville, the old corporation; that the debts of the old corporation were not extinguished by the repeal of its charter; that the same power to assess and collect taxes to pay the plaintiff's claim which existed at the time that the bonds were issued is in the new corporation, and has not been affected by the provision in the act incorporating the city of Fayetteville, which prohibits the collection of taxes for the payment of claims like those of the plaintiff; that the statute of limitations did not run during the time when the territory and inhabitants of the territory formerly embraced in the town of Fayetteville was a taxing district, and therefore is not a bar to this action; and that the plaintiff is entitled to a peremptory mandamus requiring the proper authorities of the city of Fayetteville to levy and collect taxes upon property and polls within the city, with which to pay the plaintiff's claim.

Affirmed.

MUNICIPAL CORPORATIONS — INDEBTEDNESS — NEW CHARTER — COUNTIES.—Indebtedness incurred by an incorporated town is not extinguished by the change of the town into a city by an act of the legislature: *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530, and note. But where a new county is formed out of the

territory of old counties, the new one is liable for no debts of the old ones, unless the legislature imposes such liability: See the monographic note to *State v. Clevenger*, 20 Am. St. Rep. 677.

MUNICIPAL CORPORATIONS—TAXATION—MANDAMUS.—The levy by the council of a municipal corporation of a tax for the payment of just debts, at a rate not exceeding the maximum limit of its power of taxation, is not discretionary, so that they may refuse to levy such tax for the payment of a judgment duly rendered, upon which execution has been issued and returned nulla bona, but is a duty the discharge of which may be enforced by mandamus: *Coy v. City Council*, 17 Iowa, 1, 85 Am. Dec. 539, and note.

MUNICIPAL CORPORATIONS—RESTRICTING POWER OF TAXATION.—The obligations of a municipal corporation cannot be impaired by restricting its power of taxation to the point of disabling it from performance or by a repeal of the law under which the obligation was to be enforced: *People v. Buffalo*, 140 N. Y. 300, 37 Am. St. Rep. 563.

STATUTE OF LIMITATIONS—WHEN DOES NOT RUN.—The statute of limitations barring the right to sue does not run during the time of Civil War, where the courts are not open to suitors: *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Coleman v. Holmes*, 44 Ala. 124, 4 Am. Rep. 121; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639. Contra, *McKinzie v. Hill*, 51 Mo. 303, 11 Am. Rep. 450. The inability to sue will not prevent the running of prescription: *Smith v. Stewart*, 21 La. Ann. 67, 99 Am. Dec. 709.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

ENYARD v. ENYARD.

[190 PENNSYLVANIA STATE, 114.]

DOWER—ESTATE OF—NATURE.—The statutory dower of a widow is not treated as a lien upon land, but as an interest in it. It is an estate given by the intestate laws.

COTENANCY—RIGHTS OF WIDOW OF ONE COTENANT—SECURING ADVERSE TITLE.—Where one of two cotenants dies, the dower interest of his widow in the land of the cotenancy brings her within the general rule that, where one is interested with another in an estate, an implied obligation arises to sustain the common interest, and she cannot acquire and set up an adverse title to deprive the other cotenant of his interest as by purchasing the property at a sheriff's sale had under proceedings to collect arrears of ground rent.

De Forrest Ballou, for the appellant.

Charles Frances Gummey, Jr., for the appellee.

116 FELL, J. The plaintiff and his uncle, William Enyard, owned by descent the real estate in question. William Enyard died in April, 1897, and two days after his death his widow, Catharine Enyard, purchased the property at sheriff's sale had under proceedings to collect arrears of ground rent. The adverse title thus acquired she sets up to defeat the plaintiff in ejectment. It is conceded that where one is interested with another in an estate, an implied obligation arises to sustain the common interest, and that he cannot acquire and set up an adverse title to deprive the other of his interest, but it is claimed that the dower interest of the widow is not such an interest as to prevent her from setting up the title she acquired at sheriff's sale. The general rule is stated in notes to *Keech v. Sanford*, 1

Lead. Cas. Eq. 62, to be: "Whenever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated. If one comes into an interest by the permission of another, or accepts an interest with another by the act of a third person, or of the law, as in the case of tenants in common under the same will or descent, an implied obligation arises to sustain the common interest into which he has been admitted; and equity vindicates it in the form of a trust."

The statutory dower of a widow is not treated as a lien upon land, but as an interest in it. It is an estate given by the intestate laws: *Schall's Appeal*, 40 Pa. St. 170; *Helfrich v. Weaver*, 61 Pa. St. 385. In the opinion in *McGowan v. Bailey*, 179 Pa. St. 470, it was said by our brother Dean that the widow's interest in real estate of which her husband died seised, of which there has been neither appraisement nor partition, is a freehold ¹¹⁷ estate in the land. In *Kunselman v. Stine*, 183 Pa. St. 1, it was held that the widow's interest in the real estate of her husband is such an estate as can be sold only by a writ of venditioni exponas in the manner provided by the act of January 24, 1849. In *Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696, a widow who came into possession of land through her husband, and who had a possible dower interest, was denied the right to acquire title to the land to the prejudice of his heirs and creditors. The defendant in this case, while having a dower interest only, came within the general rule, and being jointly interested with the plaintiff in the land she could not acquire a title to his exclusion.

The verdict and judgment thereon establish only the plaintiff's title. Any right the defendant may have to contribution for payments properly made for the benefit of the joint estate can be adjusted in other proceedings.

The judgment is affirmed.

DOWER—ESTATE OF—NATURE.—Dower, until the death of the husband, is merely an inchoate interest: *Moore v. Mayor*, 8 N. Y. 110, 59 Am. Dec. 373. Such inchoate right is a mere possibility, and not an estate: *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322. The inchoate right of dower in the wife is, however, a sufficient estate to entitle her to maintain a bill in equity to redeem lands from a mortgage in which she had joined with her husband: *Davis v. Wetherell*, 13 Allen, 60, 90 Am. Dec. 177. In *Porter v. Noyes*, 2 Greenl. 22, 11 Am. Dec. 30, it was held that the inchoate right of dower was an existing encumbrance which would defeat a contract to convey an

unencumbered title. And as opposed to the doctrine of the principal case, it has been held that the right of dower is an existing lien or encumbrance and not a mere possibility or contingency: *Ficklin v. Rixey*, 89 Va. 832, 37 Am. St. Rep. 891.

COTENANCY—WHO ARE COTENANTS—SECURING ADVERSE TITLE.—A person regularly deriving title from one cotenant will be regarded as a tenant in common of the property with the other cotenants: *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585. See, generally, *Metcalfe v. Miller*, 96 Mich. 459, 35 Am. St. Rep. 617. A cotenant, whether in or out of possession cannot buy and hold a tax title against the other cotenants: *Cohea v. Hemingway*, 71 Miss. 22, 42 Am. St. Rep. 449.

COMMONWEALTH v. WIREBACK.

[190 PENNSYLVANIA STATE, 138.]

WITNESSES—EXPERTS—QUESTION OF SANITY—PENITENTIARY WARDEN.—Where the prisoner's insanity is set up in defense of a prosecution for homicide, and expert testimony is given in support of such plea, together with evidence of acts and declarations of the defendant tending to show insanity, a penitentiary warden who, through a long period of service, has had opportunity to study criminals, is competent to testify that very many prisoners feigned insanity and delusions, and that some had deceived him and physicians.

HOMICIDE—EVIDENCE AS TO INSANITY—OPINION OF WITNESSES.—The opinion of a witness as to the insanity of the defendant in a prosecution for homicide is inadmissible, no foundation therefor having been laid. But it is competent for witnesses who have stated their opportunities for observing defendant to testify whether or not they had noticed anything in his conduct or conversation indicating insanity.

TRIAL—IMPANELING JURY—EXAMINATION ON VOIR DIRE.—In impaneling a jury in a trial for homicide, defendant's counsel should not be allowed, in the examination of jurors on their voir dire, to ask them whether defendant's failure to testify in his own behalf would prejudice him in their minds.

APPEAL—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTIONS.—Whether the hypothesis propounded to witnesses include the material facts necessary to the formation of an opinion, or whether facts are assumed which have no existence, rests largely in the knowledge of the trial judge, and his rulings will be held conclusive on appeal unless prejudicial error is affirmatively shown.

HOMICIDE—DEFENSE OF INSANITY.—Whether the insanity be general or partial, in order that it may excuse homicide, the degree of it must be so great as to have controlled the will of its subject and to have taken from him the freedom of moral action.

HOMICIDE—DEFENSE OF INSANITY.—MERE MORAL OBLIQUITY OF PERCEPTION does not constitute insanity excusing a person from punishment for his deliberate act, nor does a mere perversion of the moral sense, nor does an individual belief as to right and wrong, however sincere, constitute a delusion, or a phase of insanity, excusing homicide.

INSTRUCTIONS—REVIEW ON APPEAL.—In determining whether an instruction given in a trial for homicide was erroneous and prejudicial, it should be considered not only with what precedes and follows it, but in view of the idea being elucidated.

HOMICIDE—DEFENSE OF INSANITY—SANITY PRESUMED.—If the defendant in a prosecution for homicide was sane shortly before and shortly after the act of murder, the presumption is of sanity at the time of the act, which presumption could only be rebutted by showing some special frenzy or madness, connected with the act, which at the instant irresistibly impelled the defendant to commit it.

HOMICIDE—DEFENSE OF INSANITY—REQUISITE DEGREE OF PROOF.—If one accused of homicide alleges insanity as a defense, he must establish it by a preponderance of evidence, or the presumption of insanity which the law raises stands unshaken. The law recognizes no middle ground of doubt of sanity reducing murder otherwise in the first degree to murder in the second degree.

John M. Groff and C. Eugene Montgomery, for the appellant.

John A. Coyle, W. U. Hensel, George A. Lane and W. T. Brown, district attorney, for the appellee.

141 DEAN, J. Wireback, the defendant, was convicted of murder of the first degree in the court below, and sentenced to be hanged; hence this appeal.

It appears from the evidence that he was forty-eight years of age; was a manufacturer and vender of a patent medicine; in conducting his business, he traveled over Lancaster and the adjoining counties; his place of business, however, was in Lancaster city, where he made his home with his family, a wife and two sons. They lived in a dwelling-house, the property of D. B. Landis, a reputable and prominent resident of Lancaster. On July 1, 1897, Landis leased to him by writing the house until April 1, 1898, with the privilege of an extension for one year after the expiration of the term, if he, Landis, did not in the meantime sell the property. Landis did sell, about the last of August, 1897, and Wireback had knowledge of the fact, and also knew he must, by the contract, give up possession on April 1st, following. He continued, however, to pay his monthly rental promptly, but, notwithstanding the unmistakable **142** terms of his contract, frequently complained to his neighbors that his landlord, Landis, intended to wrong him by dispossessing him, when he had a right to another year's occupancy; more than once, when making known his alleged grievance, he used threatening language, such as, that he would have vengeance against anyone who came into the house, and that his principle was "justice or death." About a week before April 1st, he went to a store outside the city and purchased a breach-loading shot-

gun, with some large ammunition, saying that he "was going to have a fuss the 1st of April with a man about house rent." He then bought cordwood and had it hauled to the house; with this and other materials he barred the cellar door, and also, by like methods, closed the other entrances on the first floor of the house. As he refused to move on April 1st, Landis instituted suit for possession before an alderman under the landlord and tenant act, and, having obtained judgment, had issued thereon to a constable the usual warrant for possession. On the morning of April 7th, the constable, Graef, another constable, Price, D. B. Landis and his son, with three other men employed by Landis, seven in all, proceeded to the house to dispossess Wireback; finding the doors barricaded, they broke open one or more of them, and entered to the first floor, Wireback retreating upstairs to the second; in that position there was a parley between him and the officers; they asked him to come down; he refused, declaring that they had come there to kill him; about that time Wireback requested to see D. B. Landis, the deceased, who, in response, went up the stairs, and, on reaching the landing, discovered that Wireback had fled to the garret; he went to the foot of the garret stairs, and Wireback, who was behind a barricade at the top, called out to him, "Mr. Landis, what do you intend doing for me and my family?" Landis commenced to reply, saying "I will—" or "Well, I will—" when Wireback, from behind the barricade, fired from the shotgun the charge which struck Landis in the head and killed him instantly. Wireback neither fled nor resisted arrest. There was no substantial dispute as to the facts thus narrated. At the trial, the only defense was insanity. The evidence tending to show unsoundness of mind consisted mainly of a course of conduct distinct from and at variance with that of his life before August, 1897, when he learned of ¹⁴³ the sale of the house. It was alleged, and the evidence tended to show, that before that time he was a kind husband and had led an orderly life; that commencing about that date, and continuing down to the killing of Landis, he was at times morose, was abusive toward his wife, had fits of jealousy, and showed a disposition to lewdness; there was also evidence that he suffered from bodily disease, either real or imaginary, and had resort to childish and absurd methods of cure. Further, there was evidence of insanity in near collateral relatives of his father and mother. During the week preceding the homicide he slept and ate but little. The theory of defendant's counsel, very earnestly argued in the court below and here, is,

that Wireback, about the time he learned that he must give up the house, was diseased in body, and was severely pinched in money affairs; the consequence was, his mind became disordered; that this condition continued down to the time the attempt was made to dispossess him; that then he firmly believed the purpose of the officers, under the direction of Landis, was to attack and kill him; and that, acting on a firm conviction that this was their purpose, he resisted by opposing force to force in defense of his life. That, although this was a delusion, yet to him being a fact, the duty of defending his own life as he did was to him imperative. There was evidence on the part of members of his family, and three medical experts, Doctors Mills, Gerhart, and Diller, tending to sustain this theory. As opposed to it, the commonwealth called a very large number of witnesses who had known defendant for years, and down to the date of the homicide had transacted more or less business with him, yet had never observed any indications of unsoundness of mind; besides these, the keepers of the prison, who had every opportunity to observe him after his arrest, for more than four months, testified that during that time he gave no evidence of insanity. Physicians, one of them, Dr. Chapin, an eminent specialist, were of the opinion that, from the testimony as to defendant's conduct immediately before and after the shooting, he could not have had such frenzy or delusion at the moment the shot was fired, as suggested by his counsel. The court submitted the somewhat conflicting evidence on the question of sanity to the jury, who, having found defendant guilty of murder of the first degree, he was sentenced accordingly, and we now have this appeal, with fifty assignments of error.

¹⁴⁴ The first three and sixth to fifteenth, inclusive, allege errors in the admission and rejection of evidence. Michael J. Cassidy, warden of the eastern penitentiary, being called, testified that for thirty-eight years he had been an assistant and warden of that institution, and during that time had observation of several thousand criminals; that, as a necessity in the performance of his duty, he had studied, from the conduct of the prisoners, real and feigned insanity; that very many prisoners feigned insanity for the purpose of being removed to city hospitals, whence they could more easily escape; that many of them feigned delusions, as the most convenient method of deception. And some had successfully deceived him and physicians. The defendant objected to this testimony, as incompetent, because the witness was not a physician, nor a graduate of any institu-

tion of learning, and therefore not an expert whose opinion was admissible. To sustain the objection *Commonwealth v. Farrell*, 187 Pa. St. 408, is cited, where the witness testified to a fact depending largely on conclusions derived from scientific anatomical investigations; his opinion, derived wholly from his own observation of corpses, was ruled inadmissible, because of the doubtfulness and sparseness of the facts on which it was based. But Cassidy was not called as a scientific expert in diseases of the mind, but to establish a fact observable by any intelligent man with like opportunity. That for thirty-eight years thousands of prisoners had been under his care, and that many of them feigned insanity and pretended delusions, he knew, because, when they failed to accomplish their purpose by the pretense, it was abandoned, and they resumed the normal conduct of sane men. The defendant, when charged with a high crime, committed acts and made declarations which tended to show aberration of the mind and delusions. The commonwealth answered, that in these acts and declarations the accused might be merely feigning insanity to escape punishment, and they called one abundantly competent to testify that such conduct is common among criminals, and that at times it will deceive even experts. This is one of the very facts on which scientific experts base their deductions, and it was proper for the consideration of the jury in determining the value of defendant's expert testimony as to his sanity.

The sixth assignment is to sustaining the objection of the **145** commonwealth to the opinion of Mrs. Kate L. Shertzer, a witness called by defendant. After stating that she was a neighbor of Wireback, and had seen him often; that he was nervous and excited, especially on April 1st; that he said he was wronged, but that Landis would do the right thing by him, she was asked: "From what you saw of him, do you think he was of sound or unsound mind?" This was objected to, because the witness had stated no facts warranting an opinion. The court properly sustained the objection; no foundation for an opinion was laid; every act and declaration of the defendant testified to by her was rational. If her opinion was, that defendant was insane, it necessarily was based on facts other than those stated.

The seventh to sixteenth assignments complain that the court erred in overruling objections to the admissibility of the opinion of witnesses called by the commonwealth. Nine witnesses were called, who testified to a personal acquaintance with defendant, to having seen him, and to having transacted business with him,

some a short time before the homicide, others within three or six months of it; all stated their opportunities for observation; then, in substance, this question was put to each: "From the conversation you had with the prisoner at the time you stated, and from your observation of his conduct, manner, and appearance, did you or did you not discover anything that would lead you to believe he was of unsound mind?" Against defendant's objection, the witness was permitted to answer. In this, there was no error. The witnesses were not asked to give their opinion affirmatively, as to whether the defendant was of sound mind, for they had stated nothing to warrant such opinion; but whether they had noticed anything in his conduct or conversation irrational or indicating insanity at the times they saw and talked with him was clearly competent. The defendant alleged that he gave evidence of insanity for a period of eight months before the homicide; the commonwealth could answer it in no other way than by calling those who had seen and conversed with him during the same time to testify that they had noticed nothing indicating unsoundness of mind. The defendant might well argue that this negative, when compared with his affirmative ¹⁴⁶ testimony, was the weaker, but his objection to its admissibility is not well founded.

The twenty-third to thirty-sixth assignments are to the refusal of the court to permit this interrogatory by defendant's counsel to jurors when called to the box: "Would the neglect or refusal of defendant to testify in his own behalf create any presumption against him in your mind?" The question was wholly unwarranted; it reflected on the integrity of the juror. He might as well have been asked whether, if sworn as a juror, he would obey the law. No liberality of examination of jurors on their voir dire, accorded to those accused of crime, authorizes a question which, in its insinuation, must be an insult to an honest man. The court properly disallowed it.

The forty-second to forty-eighth assignments inclusive are to rulings on hypothetical questions to physicians and other witnesses. Whether the hypothesis propounded to the witness included the material facts necessary to the formation of an opinion, or whether facts are assumed which have no existence, rests largely in the knowledge of the trial judge, and necessarily must control him in his rulings. The evidence, as before him, is seldom so clearly before us. A careful inspection of the evidence, the hypothetical questions, and the rulings connected therewith,

complained of in these assignments, fails to convince us that any error was committed by the court.

The fourth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, and forty-first assignments all complain of errors of law in the charge and answers to points. There is probably no feature of criminal law which has been so frequently the subject of judicial consideration and opinion as that of insanity as an excuse for crime. Text-writers on medical jurisprudence and courts are, on some phases of the subject, at variance. The enunciation of the law in our own state, for many years at least, has been consistent. While conceding the existence of different types of insanity, we have persistently declined to refine upon it with the specialists, and measure criminal responsibility according to the exact degree of it. Any departure from the condition of a well-balanced mind is often pronounced insanity by science. It has even been argued with plausibility by theorists that all are insane on one or more subjects, or labor under some delusion or other. But these speculations and ¹⁴⁷ refinements help but little in the practical administration of justice; the moral guilt of one man, by reason of vicious training or inferiority of intellectual power, may be less than that of another, but the law takes no note of this in fixing responsibility for crime; nor dare it do so, if society is to be protected. Therefore, since *Commonwealth v. Mosler*, 4 Pa. St. 264, decided more than a half-century ago, it has been held in this state thus: "The law is that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." Further in the same case, it is said: "A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity. . . . Partial insanity is confined to a particular subject, the man being sane on every other. In that species of madness, it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been laboring under a moral obliquity of perception, as much as if he were merely laboring under an obliquity of vision."

In *Sayres v. Commonwealth*, 88 Pa. St. 299, the court below charged the jury thus: "If the prisoner, although he labors under partial insanity, hallucination, or delusion, did understand the nature and character of his acts, had a knowledge that it was wrong and criminal, and mental power sufficient to apply

that knowledge to his own case, and knew if he did the act he would do wrong and would receive punishment; if, further, he had sufficient power of memory to recollect the relation in which he stood to others, and others stood to him, that the act in question was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty, he would be responsible." This court, on appeal, approved this instruction, saying, "The case was treated with marked accuracy and care by the learned judge of the court below."

In the same case, the court instructed the jury that if the prisoner bona fide labored under a fixed belief that his assailant was attempting to take his life, although such belief was a delusion, and he killed him as he supposed in self-defense, he was exempt from punishment.

148 We have very many reported cases involving the same question, but in not one of them has there been any substantial variation in the law as quoted from these two cases. Reading carefully the charge, including the answers to defendant's points, we think it was a correct enunciation of the law, and entirely fair to the defendant. It was not pretended, nor could it be on the evidence, that the killing of Landis was not conceived by defendant weeks before, determined on, and the means of accomplishing it provided when the gun and ammunition were bought; then deliberately and methodically committed when the looked-for opportunity occurred. His preceding conduct and preparation for the act evince mental soundness. Concede that, in flagrant disregard of the terms of his contract, he termed Landis a wrongdoer in attempting to dispossess him; this proves nothing that warrants an inference of insanity. Observation teaches that men of crude ideas as to property rights, or of vindictive dispositions, not seldom act as if wronged, when called upon to pay an honest debt or perform an honest contract obligation. He may have wrought himself into a belief that Landis ought not to retake possession of his property; if so, it was a mere perversion of the moral sense, prompting him to violate a law of property because it seriously inconvenienced him; then, but a step further in the same direction, in assumed self-defense, he violated the law protecting the person of Landis. The whole argument of appellant rests on an unsubstantial foundation, to wit, that the individual belief of Wireback, as to right and wrong, if sincere, constituted a delusion, or a phase of insanity which as to him, at the time, excused his crime. The same sort of delusion would excuse a Mormon elder who en-

tered into plural marriage contracts in this state. He not only believes his conduct not wrong, but that it is divinely enjoined. But the law tolerates no mere individual opinion, however sincere, as an excuse for breaking the law; itself establishes the rule of conduct for the individual in his relations to society, enjoins what it deems right and prohibits what it deems wrong, and to this rule he must conform or take the consequences. The whole evidence, in one view of it, tended to show that Wireback, with full knowledge of the law, set up his own standard of right and wrong with reference to his contract with Landis and their ¹⁴⁹ respective duties under it, and followed that standard to the end. To indifference to this distinction, the rule of action prescribed by the law, and a rule of action violative of it prescribed by Wireback for himself, is owing the burden of appellant's complaint of the charge. The learned judge of the court below, throughout, had it fully in view, and so declared the law that the jury could not have failed to understand it. Defendant's ninth point and the answer thereto really lay down the law as his counsel requested, thus:

"9. If the jury believes that the reason, judgment, and understanding of the defendant were overthrown at the time of the shooting, and he really did not know what he was doing, the verdict must be not guilty, on the ground of insanity. Answer: This point is affirmed, provided the jury are satisfied from a fair preponderance of the evidence that at the time of the commission of the act the defendant had not, by reason of insanity, the power or capacity to distinguish between right and wrong at that time, in reference to the act he was about to and actually did commit."

This point and answer, in connection with the instruction in the general charge: "That no mere moral obliquity of perception will protect a person from punishment for his deliberate act," presented both the defendants and the commonwealth's legal contention perspicuously. The complaint that the court erred in saying to the jury that, "an individual who has sufficient intelligence to know that loading a pistol or gun, pointing it at a human being and pulling the trigger, are acts which may or will cause death of the person against whom they are directed, should not be acquitted on the ground of insanity," is error, if wrested from its connection, and treated as an isolated sentence. But, to determine whether the jury could have been misled, it must be considered, not only with what precedes and follows, but in view of the idea then being elucidated.

Counsel, as shown by their written point, contended that if, at the time of the shooting, the reason of defendant was overthrown, so that he did not know what he was doing, he should be found not guilty, on the ground of insanity, and this irrespective of the soundness of mind immediately before and after the shooting. If Wireback was sane immediately before and immediately after the shooting, clearly the law would presume him ¹⁵⁰ sane when he fired the shot, and this presumption could only be rebutted by his showing some special frenzy or madness, connected with the act, which at the instant irresistibly impelled him to commit it. There was nothing in the act itself or the method of it which tended to rebut the presumption. A previously prepared loaded weapon in his hands, sheltering himself behind the barricade at the head of the stairs, luring Landis, the special object of his animosity, to the foot of them, the assured aim at a vital part of the body, all indicated intelligence and reasoning power; certainly, if he were sane immediately before and immediately after such acts, he should not, from any inference to be drawn from them, be acquitted on the ground of insanity. As showing conclusively the meaning, the court below immediately follows this remark by saying: "The doctrine that an individual can be entirely sane immediately before and immediately after such act was committed, and yet insane at the instant it was committed, is contrary, as writers say, to every principle of sound psychological science. . . . Our supreme court has said the law presumes sanity if no insanity be shown, and if the person was sane shortly before and shortly afterward the presumption is of sanity at the time of the act." The meaning is further shown by the instruction immediately preceding the sentence complained of, as to an insane delusion that the officers had come to kill him, and that self-defense was his right and duty, thus: "You will readily perceive, therefore, that a delusion, to render a person irresponsible for an act which would otherwise be criminal, must be a delusion that a state of facts exist which, if really existing, would wholly excuse the act he was about to commit." The court thus impressed upon the jury the distinction between a thoroughly tenable ground of defense, a bona fide delusion as to a fact, to wit, that the purpose was to kill him, and an untenable ground, with nothing in the evidence to support it, to wit, from the act of shooting, itself, instantaneous and momentary frenzy which prompted the act. The court did not, as argued, by this sentence sweep away the defense that Wireback fired the shot under the delusion that he

was acting in defense of his life against those who unlawfully sought it. Defendant's first point, which raises the question, is substantially affirmed. The jury was told that if defendant ¹⁵¹ committed the act under any delusion which controlled his will and made the commission of the act a duty of overruling necessity, the verdict should be not guilty on the ground of insanity, but the court unnecessarily went further and added, if the delusion deprived him of all freedom of agency, the verdict should be not guilty on the ground of insanity. This addition was not suggested by any evidence that we have discovered, and left open to the jury a field for conjecture that certainly was not prejudicial to defendant.

Defendant's seventh prayer for instruction was that: "The jury need not be satisfied of the insanity of the defendant beyond a reasonable doubt, and must render a verdict of not guilty on the ground of insanity if they have a reasonable doubt." To which the court answered: "The presumption is that at the time of committing this crime Ralph W. Wireback was sane, and the burden of proof of insanity being upon him, the defendant, he must satisfy the jury by a fair preponderance of the evidence submitted to them that, at the time he committed the act, he was insane to such an extent that insanity controlled his will, and made the commission of the act he committed appear to him a duty of overruling necessity, or deprived him of all freedom of agency. If he fail to do so—if the fair preponderance of the testimony does not so satisfy the jury of such insanity, but only creates a doubt of his sanity, or reasonable doubt of his sanity—it is insufficient to justify an acquittal, and the jury should return a verdict of guilty in such case."

More than once we have attempted to settle the question raised by the assignment of error to the answer to this point. To convict of murder of the first degree, the commonwealth must prove beyond a reasonable doubt the unlawful killing and the fully formed purpose to kill; it need adduce no proof whatever of the sanity of the prisoner; the law presumes that, and the presumption is conclusive, in the absence of evidence to rebut it. If the accused alleges insanity, he must establish it by fairly preponderating evidence, or the presumption of sanity which the law raises stands unshaken: *Coyle v. Commonwealth*, 100 Pa. St. 578, 45 Am. Rep. 397; *Commonwealth v. Gerade*, 145 Pa. St. 289, 27 Am. St. Rep. 689; *Commonwealth v. Woodley*, 166 Pa. St. 463. Either the jury remained convinced of the prisoner's sanity, by the legal presumption against him, or

they are convinced of his insanity by the preponderance of evidence ¹⁵² in his favor; there is no middle ground which the law recognizes; nor does a doubt of sanity reduce the grade of the crime to murder of the second degree. From the very nature of the mental disease, there can be no grading of it by degrees so as to accord with a degree in crime. To say that a man is insane to an extent which incapacitates him from fully forming an intent to take life, yet enables him to fully and maliciously form an intent to do great bodily harm without a purpose to take life, is absurd, for the one involves the same test of responsibility as the other—the ability to distinguish between right and wrong. Either the offense of defendant is wholly excused, because the jury is satisfied by the preponderance of evidence of his irresponsibility, or he is guilty, because the evidence fails to so satisfy them.

We have thus gone over, very carefully, the evidence and assignments of error, because the gravity of the judgment against defendant seemed to demand it. We are convinced he had a lawful and impartial trial, and that the evidence was amply sufficient to warrant the verdict.

As to the objection to remarks of commonwealth's counsel to the jury, the assignment of error is irregularly preferred here, and we do not discuss it.

The judgment is affirmed, and it is ordered that the record be remitted to the court of oyer and terminer of Lancaster county, that the judgment may be carried into execution according to law.

WITNESSES—EXPERTS—OPINIONS—SANITY.—A nonexpert witness may be heard upon the question of insanity, but his competency to express an opinion must first appear, and whether he is competent or not is a question for the court: *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, and note; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181, and monographic note thereto. It is not error to exclude the opinion of a witness as to whether a person acting unnaturally was feigning or not, where no prior acquaintance between such person and the witness was shown: *Enos v. St. Paul etc. Ins. Co.*, 4 S. Dak. 639, 46 Am. St. Rep. 796.

HOMICIDE—INSANITY AS A DEFENSE—TEST.—Insanity is not available as a defense to an indictment for murder, if the accused, at the time of the killing, was capable of distinguishing between right and wrong with respect to that act, and was conscious that the act was one which he ought not to have done, although he might have been impelled by an irresistible impulse to do it: *Genz v. State*, 59 N. J. L. 488, 59 Am. St. Rep. 619, and note; *Evers v. State*, 31 Tex. Crim. Rep. 318, 37 Am. St. Rep. 811. The test of responsibility for criminal acts, where unsoundness of mind is set up as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the

subject of the inquiry: *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360. See the extended notes to *Parsons v. State*, 60 Am. Rep. 212-225, and *State v. Marler*, 36 Am. Dec. 402-411. As to when partial insanity is a defense to crime: *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; when it is not: *Commonwealth v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

HOMICIDE—DEFENSE OF INSANITY—MORAL INSANITY. The defense of moral insanity in criminal cases is so peculiarly liable to abuse that the utmost care and circumspection are required on the part of the court in presenting to the jury the legal principles relating to it: *Scott v. Commonwealth*, 4 Met. 227, 83 Am. Dec. 461. In South Carolina, moral insanity is not a defense against a charge of crime: *State v. Levelle*, 34 S. C. 120, 27 Am. St. Rep. 799.

TRIAL—IMPANELING JURY—EXAMINATION ON VOIR DIRE.—The examination of jurors upon their voir dire is not to be confined strictly to the questions formulated in the statute, but should be varied and elaborated as the circumstances seem to require, so as to obtain a fair and impartial jury: *Pinder v. State*, 27 Fla. 370, 26 Am. St. Rep. 75, and note. That only statutory questions should be asked, see *Monday v. State*, 32 Ga. 672, 79 Am. Dec. 314.

SWOPE v. DONNELLY.

[190 PENNSYLVANIA STATE, 417.]

WILLS—DECLARATIONS OF TESTATOR AS EVIDENCE. Where a will is attacked on the ground of forgery, declarations of the testator as to his intentions are admissible for the purpose of corroboration, but such evidence is not sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses.

WILLS—DECLARATIONS OF TESTATOR—NOT PROPERLY ADMISSIBLE.—Where the issue is whether or not a will purporting to have been executed on a certain day is a forgery, declarations of the testator that a will with which he was satisfied was in existence two months before that day, also an expression of intention made by him five years before that time, are irrelevant and inadmissible.

APPEAL—INSUFFICIENT ASSIGNMENT OF ERROR.—An assignment of error alleging error in the admission of evidence will not be considered, where it fails to set forth the evidence.

A paper alleged to be the will of Mary R. Donnelly, who died on December 25, 1893, and dated December 10, 1893, made Nellie Swope and Monica Doorley the residuary legatees. The decedent's husband, Patrick F. Donnelly, attacked the paper as a forgery. Four witnesses testified to the execution of the paper. Three assignments of error were made on appeal from judgment for plaintiffs. Two are recited in the opinion, and the third, which the court refused to consider, was in allowing

plaintiffs to show declarations of Mary R. Donnelly, prior to the date of the alleged will, as to her intended disposition of her property.

C. Cooper Shapley, for the appellant.

Thomas James Meagher and Patrick Duffy, for the appellees.

420 **FELL, J.** On the questions of testamentary capacity and fraud or undue influence in the procurement of a will, the declarations of a testator, not a part of the *res gestae*, but so connected in point of time with the testamentary act as to justify an inference that they indicate the state of the testator's mind when the will was executed, are admissible in evidence. Such declarations may be direct proof on the question of testamentary capacity, but as tending to establish the fact of undue influence they are hearsay merely, and without force. They are, however, admissible on that question as tending to show the susceptibility of the testator's mind to the influences which surrounded him: *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95; *Wharton on Evidence*, secs. 1009-1012; 1 *Redfield on Wills*, *551.

The proposition that the declarations of a testator as to his intentions are admissible where the will is disputed on the ground of fraud, circumvention, or forgery, has received the general assent of text-writers on the subject; but the cases in which such declarations have been admitted, where the only question was that of forgery, are few. The trend of decision seems to be very decidedly in favor of their admission in corroboration of direct proof of the execution of the will, whether made before or after its date. In *Turner v. Hand*, 3 Wall. Jr. 88, proof was admitted of conversations had with the decedent, both before and after the date of the alleged will, for the purpose of showing, among other things, that the dispositions of property contained in the paper were wholly at variance with his often expressed testamentary intentions. In *Tynan v. Paschal*, 27 ⁴²¹ Tex. 286, 84 Am. Dec. 619, declarations of the testator were said to be admissible to rebut the presumption of cancellation or revocation of a will arising from its loss or destruction before his death, and as tending in some degree to strengthen other proofs of its execution. The relevancy of such declarations was recognized in *Johnson v. Brown*, 51 Tex. 65, in a contest as to the genuineness of a will; and the declarations of a testator, made both before and after its date, expres-

sive of ill-will or of kindness toward the beneficiaries, were admitted. In *Hoppe v. Byers*, 60 Md. 381, a very carefully considered case in which the authorities on the subject are reviewed, it was held that after the introduction of direct proof of the genuineness of the handwriting, met by direct proof to the contrary, declarations of the deceased corroborative of such direct proofs were admissible in evidence. A like ruling was made in *Taylor will case*, 10 Abb. Pr., N. S., 300.

In all of these cases it was said, in effect, that the proof of declarations was not in itself sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses, and that it was admissible only for the purpose of corroboration. In the opinion in *Hoppe v. Byers*, 60 Md. 381, it was said: "But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, and had not been preceded by direct proof of witnesses to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence has been first given, proper for the consideration of the jury." At the best, this is a dangerous class of testimony, and its admission should be carefully guarded, and its effect as corroborative only should be clearly defined.

In this case the deceased, who was a married woman without children, died on December 25, 1893. The writing offered for probate is dated December 10, 1893, and by it all her property is given to her sisters and nieces, to the exclusion of her husband. The assignments of error are to the admission of declarations of the deceased made to witnesses before the execution of the writing as to the disposition which she intended to make⁴²² of her property. There was not the slightest limit as to the time when the declarations were made, and, under general offers, the witnesses were allowed to testify to conversations had at any time during the life of the deceased. This led to the introduction of testimony which was clearly irrelevant. One witness, Emma Witherspoon, testified to a conversation with the deceased in October preceding her death, in which she said she had executed a will, and then had it with her, in which she had provided for one of her sisters, and that she wished her husband to have only what the law would allow him. Another, Mary Muldoon, testified that the deceased had said to her that

she wished her money to go to her people, and that she would not leave a dollar to her husband if the law did not compel her to do so; and that on one occasion she had gone with her to see a lawyer about making her will. This was about five years before her death. The writing in question, if genuine, was prepared by the deceased in the house of her sister about fifteen days before her death. The testimony of one of the witnesses tended to show that there had been a prior will, that of the other an intention to make a will, and perhaps that of both a general intent that her husband should receive only such share of her estate as the law would give him. But upon the real issue, whether a will had been executed in December, 1893, this testimony threw a very uncertain light, and it was altogether too vague and remote to be considered as corroborative of the testimony of the witnesses to the execution of the writing offered as a will. The fact that a will with which the deceased was satisfied was in existence in October could not be corroborative of testimony that another will had been executed in December, and the mere expression of an intention to make a will five years before would have no weight whatever.

In justice to the learned trial judge, it should be said that many of the questions which elicited this irrelevant testimony were not objected to at the time, and he may have considered them as having been asked without objection. They came, however, without specific objections, under the general rulings on the subject, one of which was on the question, "What disposition did she tell you she was going to make of her property?" And the other on an offer to prove declarations of the deceased made at any time.

423 Leave was given at the argument to amend the first and second assignments by adding thereto the testimony to the admission of which exceptions were taken at the trial. The third assignment is not in compliance with the rules of this court, and will not be considered. The first and second assignments of error are sustained, and the judgment is reversed with a *venire facias de novo*.

WILLS—DECLARATIONS OF TESTATOR AS EVIDENCE. Generally, the declarations of a testator are not competent evidence to impeach the validity of a will. And evidence that the deceased had in his lifetime often declared his ignorance of the existence of a will executed by him is inadmissible: See the note to *Roberts v. Trawick*, 52 Am. Dec. 168. Declarations of the ancestor, under whom both parties claim, unaccompanied by any act, showing what disposition he had made or intended to make of his estate, are not

evidence: Chadwick v. Webber, 3 Greenl. 141, 14 Am. Dec. 222. A testator's declarations are admissible only for the purpose of showing the state of his mind: Comstock v. Hadlyme Soc., 8 Conn. 254, 20 Am. Dec. 100; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71, and note thereto; Reynolds v. Adams, 90 Ill. 134, 32 Am. Rep. 15.

APPEAL—ASSIGNMENT OF ERROR.—An exception to the admission or rejection of evidence will not be considered by an appellate court when the record does not state what the evidence was: Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101; Harris v. Tyson, 24 Pa. St. 347, 64 Am. Dec. 661; Sewell v. Eaton, 6 Wis. 490, 70 Am. Dec. 471; Burson v. Fire Assn., 136 Pa. St. 267, 20 Am. St. Rep. 919.

STEINMEYER v. SIEBERT.

[190 PENNSYLVANIA STATE, 471.]

EQUITY—JURISDICTION—SPECIFIC PERFORMANCE.

The rule that equity will not entertain jurisdiction to decree specific performance respecting goods, chattels, stocks, and other things of a merely personal nature, is limited to cases where compensation in damages will furnish a complete remedy. Where the wrong is a betrayal of confidence, equity will decree restitution, which may be enforced specifically against the wrongdoer.

APPEAL—FINDINGS OF JUDGE SITTING AS CHANCELLOR.—Findings of fact made by a judge sitting as chancellor will not be disturbed on appeal except for error which clearly appears. An apparent preponderance of testimony against them is not sufficient to lead to a reversal, where there is testimony which might warrant them.

Bill in equity to compel the restitution of stock of a corporation. The stock in question was one hundred and forty-seven shares of stock in the Ewalt Street Bridge Company, alleged by plaintiff to belong to his testator, Christian Siebert, but which purported to have been transferred to the defendant, P. W. Siebert, a son of the testator, before the latter's death. The lower court, sitting as a court of chancery, found as conclusions of fact that the defendant stood in a relation of great confidence and trust to his father as his confidential agent, and, in short, that he had no right to any but twelve of the one hundred and forty-seven shares of stock mentioned above. In pursuance of the findings, a decree was entered directing a transfer of one hundred and thirty-five shares of stock to the executor, and directing the defendant to pay over to the executor the amount of dividends which he had received on the shares. Appeal from this decree.

J. S. Ferguson and E. G. Ferguson, for the appellant.

W. B. Rodgers and J. R. Sterrett, for the appellees.

474 FELL, J. The contention that the plaintiff was not entitled to proceed in equity because he had an adequate remedy at law cannot be sustained. No contract in relation to the stock of the Ewalt Bridge Company is set up by the bill, but it is alleged therein that the defendant Siebert never had any right to or interest in the stock, and that he obtained the legal title thereto fraudulently and by the abuse of the relation of trust and confidence in which he stood to the real owner. The prayers of the bill were for discovery, an account, and for transfer of the stock. The rule that jurisdiction in equity will not be entertained to decree a specific performance respecting goods, chattels, stocks, and other things of a merely personal nature is limited to cases where a compensation in damages will furnish a complete remedy. Where the wrong is a betrayal of confidence, equity will decree restitution, which may be enforced specifically against the wrongdoer. In *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584, a clerk was compelled to surrender drafts, maps, plans, et cetera, which he had withheld from his employer; in *Abbott v. Reeves*, 49 Pa. St. 494, 88 Am. Dec. 510, persons who had borrowed stocks and bonds from an executor were required to make restitution; in *Pennsylvania* 475 *Co. v. Franklin Fire Ins. Co.*, 181 Pa. St. 40, the defendant was required to issue new certificates of stock to an owner whose certificates had been transferred under forged powers of attorney. In the case last cited, it was said by our brother Dean that on the ground that an action at law would be an inadequate remedy "equitable jurisdiction in suits by shareholders against the corporation has, on like prayers, been frequently sustained both in the English courts and our own."

The established rule under the former practice was that the findings of a master on conflicting evidence, approved by the court, would not be reversed except on clear evidence of mistake: *Stocker v. Hutter*, 134 Pa. St. 19; *Brotherton v. Reynolds*, 164 Pa. St. 134. The same rule applies to the findings of fact of a judge sitting as a chancellor under the new equity rules; his findings are not conclusive upon us, but they will not be disturbed except for error which clearly appears. An apparent preponderance of testimony against them is not sufficient to lead to a reversal, if there is testimony which, if believed, will warrant them. The credibility of witnesses, and in a large degree the conclusions to be drawn from their testimony, which

depends upon their character, intelligence, and knowledge of the subject, can be determined much better by the judge who hears them than by us on appeal: *Stockett v. Ryan*, 176 Pa. St. 71; *Commonwealth v. Stevens*, 178 Pa. St. 543; *Hancock v. Melloy*, 187 Pa. St. 371. We have referred to this subject, not because we have entertained any doubt as to the correctness of the conclusions reached in this case, but in order that it may be better understood by the profession, as many cases came here on appeal in which the real question, as in this, is one of fact to be determined by the consideration of conflicting evidence. The findings of fact of the learned judge are stated with clearness and precision, and we have no hesitation in accepting them as abundantly sustained by the testimony.

The decree is affirmed at the cost of the appellant.

EQUITY JURISDICTION—SPECIFIC PERFORMANCE—PERSONAL PROPERTY.—Specific performance of a contract respecting personal property will not ordinarily be enforced in equity unless an adequate remedy at law cannot be had: *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, and note; *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892; see the monographic note to *Anderson v. Green*, 23 Am. Dec. 423. Equity will decree the specific performance of a contract to convey personal property, if like property cannot be obtained elsewhere, or if loss cannot be adequately compensated by damages in an action at law: *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811, and note.

APPEAL—FINDINGS OF JUDGE SITTING AS CHANCELLOR.—An appeal may be taken in equity cases on questions of fact as well as of law, and the appellate court may go behind the findings, weigh all the evidence, and decide according to its preponderance; but the findings of the court below will not be disturbed when the evidence as to a fact is so evenly balanced, or the proof of it so unsatisfactory as to cause the mind to hesitate and pause as to the side on which it preponderates, and to leave it in grave doubt: *North Point Irr. Co. v. Union etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607. The general rule is that findings will not be disturbed: *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188; *Pollock v. Carolina etc. Assn.*, 51 S. C. 420, 64 Am. St. Rep. 683; *Holker v. Hennessey*, 141 Mo. 527, 64 Am. St. Rep. 524.

EQUITABLE TRUST COMPANY v. GARIS.

[190 PENNSYLVANIA STATE, 514.]

EQUITY—JURISDICTION—DISCOVERY OF LUNATIC'S PROPERTY.—The committee of a lunatic is the proper party to maintain a bill in equity against the lunatic's husband for the discovery and delivery of possession of muniments of title, negotiable securities, and personal property, belonging to the lunatic's estate and in the possession of the husband, where the latter denies her title, or there is reason to apprehend that he will treat such property adversely to her interest.

CORPORATIONS—TRUST COMPANY—PRESUMPTION OF CAPACITY.—In the absence of specific restriction in its charter, a trust company having general power to "execute trusts of every description" must be presumed to have corporate capacity to act as committee of a lunatic.

INSANE PERSONS—POWERS OF COMMITTEE—EFFECT OF APPEAL FROM ORDER OF COMMITMENT.—An appeal from an order of commitment entered in lunacy proceedings does not oust or suspend the committee of a lunatic from its functions, nor relieve it of the duty to guard the lunatic's property. Such committee may still sue in equity for the discovery and deliverance of property of the lunatic held by an unauthorized person.

EQUITY—DISCOVERY OF LUNATIC'S PROPERTY—SCOPE OF PRELIMINARY INJUNCTION.—Under a bill in equity brought by the committee of a lunatic against the latter's husband for the discovery of property of the lunatic kept by the husband in a box in a safe deposit company, a preliminary injunction should go no farther than is necessary for the protection and enforcement of the lunatic's rights to property in such box, and should not infringe upon defendant's right to take therefrom property belonging to him and not claimed by the committee.

INSANE PERSONS—ADMINISTRATION OF LUNATIC'S ESTATE—DISBURSEMENTS—NOTICE TO NEXT OF KIN.—Before ordering disbursements from a lunatic's estate upon petition of the committee, notice should be given to the next of kin, or parties standing in close relation to the lunatic.

INSANE PERSONS—ADMINISTRATION OF ESTATES OF. It is the duty of a court in administering the estate of an insane person to keep expenses within reasonable bounds, to sacrifice the estate only when all the circumstances of the case make it necessary, and to see to it that the future comfort of the lunatic shall be made as secure as possible.

Samuel M. Roberts and Allen H. Gangewer, for the appellant.

Dwight M. Lowrey, Alfred R. Haig, Henry C. Thompson, Jr., and William F. Harrierty, for the appellee.

548 MITCHELL, J. This case has been unfortunately conducted from the outset. The extravagance of the appellant's contentions has led to efforts to put a summary end to them by irregular proceedings which cannot be sustained. For this reason a commitment for contempt was reversed: *In re Garis*, 185 Pa. St. 497.

Substantially, it is a contest between the committee of a lunatic wife and the husband for certain property claimed by both, and, in the form in which it is now before us, it is a bill filed by the committee against the husband, setting forth on information and belief that certain muniments of title, negotiable securities, and personal property belonging to the lunatic's estate were in the possession of the husband, and that part of them at least had by him been deposited in a private box in the Columbia Avenue Trust Company. The latter was also made a formal defendant. The bill prayed for discovery, delivery of the said property, and an injunction against the husband from opening the said box, and against the trust company from permitting him to have access to it.

The husband filed an answer, denying the essential averments as to his possession of the property. The denial, however, was purely formal, and as to matters which, if true, must be within his personal knowledge, as, for example, the averments of the fourth, seventh, tenth, eleventh, and twelfth items of the bill, ⁵⁴⁹ the answer was clearly evasive and insufficient. The appellant and his codefendant, the Columbia Avenue Trust Company, then put on record an agreed statement of facts, setting forth the connection of the company with the matter, and the appellant filed a cross-bill against the Equitable Trust Company denying its capacity to act as committee, its right to bring suit against the husband of the lunatic, and raising questions of law upon these and other matters appearing in the bill. The court below, upon a preliminary hearing, issued an injunction, which is the main subject of the present appeal. Before discussing its terms, it is desirable to clear away some of the preliminary questions involved, so that the case may be put in position to proceed regularly to final determination.

A bill in equity will lie in appropriate circumstances for discovery and delivery of possession of deeds and other muniments of title, certificates of stock, negotiable securities, and other personal property having special and peculiar value which is not adequately represented by market price. The committee of a lunatic is the proper party to bring and maintain such bill for the lunatic's property.

Such bill may be maintained by the committee against the husband of the lunatic where he denies her title, or there is reason to apprehend that he will deal with the property in any way adversely to her interest.

In the absence of specific restriction in its charter, which

nowhere appears, the Equitable Trust Company, by virtue of its general powers under the act of May 9, 1889 (Pub. Laws, 159), to "execute trusts of every description," must be presumed to have corporate capacity to act as committee of the lunatic.

The bill could be filed, notwithstanding the removal of the record of the lunacy proceedings to this court by the appeal from the order of commitment. That appeal did not oust or suspend the committee from its functions, or its duty to secure the property of the lunatic. The bill was filed in the same court and of the same term and number as the lunacy proceedings, but that was a mere incident arising from the rules of the courts of Philadelphia county for the proper and convenient distribution of their business. Except for those rules it might have been filed in a different court and have made part of a different record.

550 The bill, therefore, was properly filed, but it must be sustained in the regular way, and the defendant cannot be deprived of property, of which he is in possession under claim of title, without hearing and competent evidence. The extravagance of his claims cannot bar him from his actual rights. In view, however, of the nature of the property in controversy and the facility with which the purpose charged, to remove it from the jurisdiction, might be carried out, the court was authorized to grant a preliminary injunction to protect the lunatic's interests, should her title be hereafter established.

This brings us to the consideration of the terms of the injunction. These are too broad. It appears by the agreed statement of facts that the appellant deposited in the Columbia Avenue Company in November, 1894, a tin box, containing valuables not named, and in April, 1896, rented a safe in the vaults of the said company, and deposited therein a number of things also not specified. These acts were done in his own name, and the later of them more than a year before the proceedings in lunacy began, though the inquisition found that the lunacy had extended back to February, 1896, thus antedating by two months the renting of the safe. The presumption from these facts is, that part at least of the property on deposit in the Columbia Avenue Company is the appellant's own, and though his failure to say so in explicit terms, and to specify the articles he so claims, greatly weakens such presumption, yet he should not be deprived of the property without a full opportunity to defend his title.

The injunction is also somewhat carelessly worded, so that it

appears to be inconsistent in requiring the boxes to be opened by the Columbia Avenue Trust Company, without the presence of the appellant, and in prohibiting him from opening them, while at the same time requiring him to make a detailed inventory of their contents. And the last paragraph is clearly excessive, in requiring appellant to produce and deliver to the committee the bonds, mortgages, et cetera, including his own note in his wife's favor, the title and even existence of which have not yet been established. This order can only be made on final hearing, the power of the court at present being limited to the preservation of the existing status of the property until the title to it is determined.

⁵⁵¹ In the present position of the case the committee, plaintiff, is entitled: 1. To discovery and inspection of the contents of the box and safe in the vaults of the Columbia Avenue Trust Company, to be made in the presence of both parties or their attorneys; 2. To the immediate delivery of such of the contents of said box and safe as are or may be admitted by the appellant to be the property of the lunatic; 3. To an injunction until final hearing or until further order of the court, restraining the appellant from selling, pledging, assigning, removing, or otherwise interfering with such contents of the said box and safe, as may be claimed by him, but also claimed by the committee as the property of the lunatic; with leave, however, to the appellant to apply at any time to the court for permission to resume the possession and control of any of the said contents upon giving security that the same or the value thereof shall be forthcoming to abide the final decree in the case; 4. The appellant to be at liberty, in the presence of the proper attorneys or representatives of the Equitable Trust Company and the Columbia Avenue Trust Company, to remove such contents of the said box and safe as are not claimed by the committee as the property of the lunatic; and after such removal the Columbia Avenue Trust Company may be enjoined from permitting the appellant to have access to the said box and safe, except in the presence of the attorney or representative of the said committee. The injunction having been thus modified, the case should proceed promptly to a final hearing and decree.

This disposes of the substantial controversy in the case, in its present position. But the third assignment of error requires notice of another matter. The court below, on petition of the committee in July, 1897, ordered payment of certain expenses for costs of inquisition, board of the lunatic, et cetera, out of

the lunatic's estate, and the application of the income thereafter to her board from time to time. When the case was here before, 185 Pa. St. 497, it was held that this could be done without notice to the party instituting the proceedings. But it is better practice to give notice to the next of kin, or parties standing in close relation to the lunatic. The danger of not doing so is illustrated ⁵⁵² by the similar but more extensive order made in July, 1898, whereby the committee was authorized, not only to apply the balance of the income, but "so much of the principal as may be necessary after the income is exhausted" to the support of the lunatic. This was a highly improvident order. The estate, as set forth in the petition of the committee, amounted in 1898 to about nine thousand four hundred dollars, yielding an income of six hundred and fifty dollars, which the expenses of maintenance as at present conducted would exceed by about one hundred and seventy-five dollars annually. The situation, therefore, was one of annually decreasing principal and increasing deficit, a situation calling for the utmost care and discretion in administration. This discretion should not be surrendered by the court to any other tribunal, and especially not to the committee by any general order. The principal of the estate should only be sacrificed to necessity, and such necessity should be determined in each specific instance by the court itself, having before it all the circumstances, including the nature and value of the property, the age, condition of health and situation in life of the lunatic, the effect of loss of accustomed comforts, the prospect of increasing infirmities, et cetera. It is the duty of the court to see that the future comfort of the unfortunate shall be made as secure as the circumstances permit, and for that purpose to keep present expenses within reasonable bounds. As said by this court in *Wier v. Myers*, 34 Pa. St. 377, "all those expenses ought to be carefully supervised by the court, and, considering the helpless condition of the lunatic, none ought to be allowed except such as are manifestly just and moderate" Especially is it the duty of the court to see that the estate is protected in the administration. Commissions, fees, and charges of all kinds should be allowed only on the most moderate scale of compensation.

We have considered this case, as was our duty, in the light of the appellant's legal rights. But we are not impressed with the merits of his contention. Whatever claim or title he has to any of the property in controversy he should show promptly and clearly. As against the committee, he has no right of pos-

session of any of his wife's property, and, in the language of the chief justice when the case was here before, if he has any such property in his possession he ought to turn it over to the committee and save further trouble.

The decree is reversed and the record is remitted, with directions ⁵⁵³ to amend the order of July 18, 1898, by striking out the authorization of the application of any part of the principal of the estate to the support of the lunatic without express direction of the court, and to reform the order and injunction of November 15, 1898, in accordance with this opinion. The costs of this appeal to abide the final result of the case.

INSANE PERSONS—EQUITY JURISDICTION—POWERS OF COMMITTEE—SALE OF PROPERTY.—The exclusive care and custody of the estate of idiots, lunatics, and habitual drunkards, as well as of their persons, are vested by statute in the court of chancery: *L'Amoureux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655. Lunacy or mental unsoundness does not give a court of chancery jurisdiction over the incompetent until after the inquisition of a jury adjudging him to be non compos mentis: *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258. It has been held that a court of equity has inherent power to order a sale of a lunatic's real estate: *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111. But this broad statement seems to have some qualification, and the sale of the property of a lunatic can be authorized by a court of chancery only when applied to by a regularly constituted guardian, committee, or trustee, charged with the duty of maintaining such lunatic and protecting and managing his estate. A mere stranger to the lunatic's estate, though akin to him by blood, cannot by his petition give the court jurisdiction: *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258. The power of the committee of a lunatic to deal with his estate was at common law restricted to the preservation of the estate and the application of the rents and income to his proper support and maintenance, to the exclusion even of creditors, if necessary: *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258. See generally on the question of the expenditure of the income of the lunatic's estate, the monographic note to *Villard v. Robert*, 49 Am. Dec. 657; *Patton v. Thompson*, 2 Jones Eq. 411, 67 Am. Dec. 222; *Campbell's case*, 2 Bland, 209, 20 Am. Dec. 360.

CORPORATIONS—POWERS.—A company may foster its legitimate business, whatever it is, by all the usual means, but it can go no further: *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778. A corporation, unless prohibited by its charter or by statute, has power to make all contracts requisite for the purpose for which it was created. A corporation may act as an administrator when the law does not require the administrator to take an oath, or to do any other act which a corporation is incompetent to perform: *Deringer v. Deringer*, 5 Houst. 416, 1 Am. St. Rep. 150.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

CLEMENT v. INSURANCE COMPANY.

[101 TENNESSEE, 22.]

INSURANCE—LIFE—INCONTESTABILITY.—Where a policy of life insurance provides that after one year from its inception it shall be incontestable if the premiums are paid, such policy cannot be contested by the insurer, after a year has elapsed, on the ground of fraud in obtaining the policy, and it makes no difference whether suit is brought upon the policy by the assured's representatives or any bona fide assignee of the assured.

INSURANCE — LIFE—INCONTESTABILITY—FRAUD OF ASSIGNEE.—Where a policy of life insurance provides that it shall be incontestable by the company after one year if the premiums are paid, and suit is brought thereon by a transferee of the policy, after the lapse of such time, the premiums being paid, the insurer may, nevertheless, defend upon the ground that the plaintiff is not a transferee in good faith, and that the transfer was a mere evasion of the rule against wagering policies, and evidence in support of such defense is admissible.

INSURANCE—LIFE—PAYMENT OF PREMIUMS TO AGENT—PROOF.—Where a policy of life insurance provides that premiums thereon may be paid to an agent producing a receipt therefor signed by the president or other named officers of the company, the payment of premiums is sufficiently established in a suit on the policy, by evidence that they were paid to one held out as a general agent of the company who delivered a receipt signed by the president when the payment was made.

INSURANCE—LIFE — INSURABLE INTEREST—WAGERING POLICY.—One who takes out a policy upon the life of another paying the premiums therefor himself must have an insurable interest in the life of that other, or the policy will be a mere wager policy upon which the party to whom it was issued cannot recover.

INSURANCE—LIFE—ASSIGNMENT—INSURABLE INTEREST.—While, when a policy of life insurance has once been issued to a beneficiary legally entitled, he may assign or transfer it to another who has no insurable interest, the transfer or assignment must be in good faith, and not a mere colorable evasion of the pro-

vision in regard to wagering contracts and in order to validate or legalize the same.

INSURANCE — LIFE — INCONTESTABLE CLAUSE—WAGERING TRANSFER.—An incontestable clause in a policy of life insurance cannot be relied upon to aid a transferee thereof who, by means of an unauthorized and illegal transfer, commenced before, and consummated after, the policy issued, to recover thereon. Such clause does not preclude inquiry into the transfer and the right of the transferee to take under the policy, and if the transfer is a wagering transfer the transferee cannot recover.

Caldwell & Lowe, for the appellant.

Turley & Wright and Moore & Wells, for the appellee.

24 WILKES, J. This is an action upon a policy of insurance for eight thousand dollars upon the life of Mattie Lee Wright. The policy was issued on October 11, 1893, and was payable to the executors, administrators, and assigns of the insured. On October 19, 1893, it was assigned to R. H. Clement and W. B. Kerr, upon consideration that they pay the premiums as they should accrue, as well as the premiums upon a policy of two thousand dollars issued simultaneously by the assured upon his life for the benefit of his wife, and the further consideration of twenty-five dollars paid to the assured himself. The assured died December 27, 1894, or one year, two months, and sixteen days after the policy issued, he being about twenty-six years of age. After his death, W. B. Kerr assigned two thousand two hundred and twenty-eight dollars and ten cents of his part and interest in the policy to the Jerome Hill Cotton Company, to satisfy an attachment which had been levied upon it, and afterward, but before this suit was instituted, assigned the remainder of his interest under the policy to his two sons, the complainants, W. A. and E. B. Kerr.

Upon the hearing of the cause in the court below, upon a voluminous record and a vast volume of proof, the chancellor was of opinion that complainants were not entitled to recover upon the policy, nor to any relief, and he dismissed the bill at **25** their cost, and they have appealed and assigned errors.

The learned chancellor, in his decree, set out in full his finding of facts and conclusions of law thereon. We are satisfied, from an examination of the entire record as it is presented, that the chancellor was, in the main, correct in finding the facts as follows:

When the policy was issued, the insured was not a fit and suitable subject for insurance, because of ill-health and bodily infirmities of a serious character, which was well known to him,

and concealed by him in making his application, and he procured the policy by fraudulent misrepresentations as to his physical condition. It also appears that prior to the delivery of the policy, and doubtless prior to the application, the said R. H. Clement and W. B. Kerr had agreed with the insured, that, for the consideration heretofore stated, he would transfer the policy for eight thousand dollars to them, and the policy was procured in conformity to, and in pursuance of, such agreement, said Clement and Kerr paying the cash premium to the agent, but not until after the transfer was made and policy delivered to them. The terms of the transfer recite that Clement and Kerr were creditors of the insured, but such does not appear to be the fact from the record, except so far as that relation may be said to have arisen out of the agreement referred to, nor were they in any way related to him, nor did they have any insurable interest in the ²⁶ life of the deceased, but had knowledge of his physical condition. The chancellor was, therefore, of opinion that the transaction was a gambling or wagering contract upon the life of the insured; that to recognize or enforce it would be contrary to sound public policy, and that the subassignees or transferees of W. B. Kerr could stand upon no other or higher ground than he could.

Unquestionably, the findings of the chancellor are correct, and his conclusions correct, upon the record as presented to us, unless they are controlled and neutralized by the provisions of the policy in regard to the right of the company to contest its liability in case of death. The provision referred to is as follows:

"Incontestability.—After this policy shall have been in force one full year, if it shall become a claim by death, the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed."

The rights of the parties are thus made to turn upon the force, effect, and extent of this provision in the policy. It must be apparent from the outset that this provision was intended to have some material effect, and was not inserted as a matter of form. No more tempting provision to an applicant could be introduced into a policy of life insurance than this one, which guaranteed to the applicant that his policy should not be contested after the expiration of one year, provided the premiums were paid.

²⁷ Premiums upon life policies are often paid at a great sacrifice, and one of the most disturbing and unsatisfactory features

of the insurance contract is the fact that, after these sacrifices and payments have been made for a number of years, and the insured has died, so that his testimony and perhaps that of others has been rendered unavailable by the lapse of time and the occurrence of death, instead of receiving the promised reward, the beneficiary will be met with a contest and a lawsuit to determine whether the insurance ever had any validity or force. Hence it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others.

The provision in this case is very broad in its terms. There is only one condition upon which the validity of the policy can be questioned, after the lapse of a year, and that is the nonpayment of premiums. The meaning of the provision is, that if the premiums are paid, the liability shall be absolute under the policy, and that no question shall be made of its original validity. No reasonable construction can be placed upon such provision other than that the company reserves to itself the right to ascertain all the facts and matters material to its risk, and the validity of their contract for one year, and if, within that time, it does not ascertain all the facts, and does not cancel and rescind the ²⁸ contract, it may not do so afterward upon any ground then in existence.

The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy.

It has been held that an agreement limiting the time within which an action may be brought upon a policy of insurance by the beneficiary is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. If this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts.

It is said, however, that fraud appearing in the origin of the contract must, as in any other case, render it null and void from the beginning. It is true that fraud vitiates all agreements and undertakings based upon it, and they may be set aside at the instance of the party defrauded. So, in this case, fraud in obtaining the policy would vitiate it at the option and upon the motion of the party defrauded, but, under the provision in question, the party must, within the year, exercise his right to repudiate and

rescind it. The effect of this agreement not to contest is to put the company in the attitude of being unable to set up any fraud or false swearing in obtaining the policy, or any other defense²⁰ to it, save the one excepted, so far as its original validity is concerned. Unless the language be thus construed, it is impracticable to put any reasonable interpretation on it. Unless it is the object and purpose of the provision to cut off all defenses arising out of the false statements of the applicant to obtain it, it is difficult to see what practical benefit the insured is to derive from it.

It has been well said: "The effect of the provision is to prevent the insurer from interposing as a defense the falsity of the representations of the insured, which is a fraud. But it does not prevent abandonment, rescission, and cancellation of the contract for such fraud, provided the action for that purpose is brought within a year." It is virtually saying to the insured that "I will take one year in which to ascertain whether your representations are false or not, and whether you have been guilty of any fraud in obtaining the contract, and if within that period I cannot or do not detect such falsity and fraud, I will obligate myself to make no further inquiry into these matters, and to make no defense on account of them."

It has also been properly said: "Such a stipulation ought to be an incentive to the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations upon which the policy issued, while the matter is fresh, and thus it operates fairly between the parties. The witnesses are all alive, and the exact truth can, if ever,³⁰ be ascertained, and the stipulation prevents the insurer from laying by and receiving the premiums during the life of the insured, and after his death, when the good faith and the truth of his representations cannot be supported by his own oath and strengthened by his own efforts and superior knowledge, contesting the policy upon the ground that the insured's representations were false. It is true there is in the policy a stipulation that fraud shall vitiate it, but this is not inconsistent with the further requirement that the insurer must set up the fraud during the time limited": *Wright v. Mutual Ben. Assn.*, 43 Hun, 61; *Wood v. Dwarrris*, 11 Ex. 493; *Wright v. Mutual Ben. Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749; *Kline v. National Ben. Assn.*, 111 Ind. 462, 60 Am. Rep. 707.

Fraud is always required to be set up promptly when discovered, or it may be treated as waived, and the effect of this stipu-

lation is that the insurer must exercise due diligence to discover such fraud within the year, and, if it fails to do so, it will treat it as waived, and no inquiry will be made or allowed into such matters. It clearly appears, from the record in this case, that the company in one year could have discovered all the facts now disclosed in the proof relating to this question.

Objection was made by the complainant to any testimony relating to the truth or falsity of the representations made or fraud practiced by the assured, ³¹ or the transferees in obtaining this policy, but such objections were overruled, and much testimony pro and con was taken on this point, and this is now assigned as error. We are of opinion this would be error if the present suit was being prosecuted by the assured's representatives or any bona fide assignee of the assured. To give any effect to the stipulation, if the suit were in the interest of the original beneficiary or his bona fide assignee, the company must be estopped from inquiring into any matter involved in the original validity of the policy. But when the suit is brought by a transferee, and the chancellor was of opinion that such transferee did not hold in good faith, and that the transfer was but a mere evasion of the rule against wagering policies, then the evidence was admissible on the question of fraud or good faith on the part of the transferee.

It is said by the defendant company there is no sufficient proof that the premium due one year after the policy issued was ever paid to the company.

The bill alleges that the premium was paid promptly when due, and a receipt is filed for the same and made an exhibit to the bill; and again that all premiums have been promptly paid on the policy when due, and these payments were made under the agreement by the assignees, R. H. Clement and W. B. Kerr.

The contest is not that the premium was not paid, but that there is no evidence that such payment ³² was made to the company or any authorized agent of the company. The answer neither admits nor denies the payment, but calls for strict proof of the same if deemed material. The alleged receipt, filed with the bill as an exhibit, is in the words and figures following:

"New York Life Insurance Co.,
"346 & 348 Broadway, New York.

"Received \$164, being the annual premium due October 11,
1894, upon policy No. 565,543.

"JOHN A. McCALL,
"President.

"Countersigned by
"WM. H. WOOD,
"Cashier."

On the back of this receipt there is printed a "Notice to Policy Holders," and one clause of the notice is as follows: "All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but any premium may be paid to an agent producing a receipt therefor signed by the president, vice-president, second vice-president, actuary, or secretary, and countersigned by such agent." A similar provision is found in the policy itself. William H. Wood was not examined, but it was attempted to be shown that he stated that he was the general agent of the company at Memphis, where it had a branch office; that he was authorized to receive premiums and give receipts; and that he did receive the premium as stated, and executed the receipt. This evidence was objected to ³³ on the ground that agency cannot be proven by the statements of the party assuming to act as such. The objection was overruled by the chancellor, and to his ruling exception was taken. It is now assigned as error by the company that the chancellor improperly admitted this testimony, and the same should have been excluded. We think there is ample evidence that Wood was held out and recognized as the general agent of the company, and that he had in his possession the receipt of the company signed by its president, John A. McCall, and delivered this when the payment was made.

In regard to the point made that the assignees, R. H. Clements and W. B. Kerr, had no insurable interest in the life of the deceased, and the transaction as to them was invalid and void, it is necessary to repeat that the policy was not made payable to them when originally issued, but to the executors, administrators, and assigns of the insured. Within a few days thereafter, it was regularly assigned to said Clements and Kerr. The manner and form prescribed by the policy, and the assignment or transfer was made known to and recognized by the company by receiving and retaining a copy of the transfer. A policy for ten thousand dollars had been previously procured in another company, pay-

able to Clements and Kerr, but in which the wife was to have a beneficial interest to the extent of two thousand dollars; but this policy was not acceptable to Clements and Kerr, and they declined to receive it, and the application ³⁴ was then made for the present policy, payable to the assured, with an agreement that he would transfer it to Clements and Kerr. The insured, before his death, executed a last will and testament, in which he recited that he was indebted to Clements and Kerr prior to October 1, 1893; that the policy had been issued to him and transferred to them on October 19, 1893, and the transfer accepted by the company November 14, 1893; and in his last will he directs that the proceeds of the policy be paid to them in the event of death.

As before stated, neither Clements nor Kerr were related in any way to the insured, nor were they creditors, nor did they give any consideration for the transfer, except the twenty-five dollars paid the insured, and undertaking to pay the premiums on the transferred policy, as well as the two-thousand-dollar policy issued at the same time with the policy in controversy upon the assured's life in favor of his wife, and they had knowledge of the assured's physical condition. If this transfer is not authorized by the policy or by any rule of law, or is opposed to any sound ground of public policy, we cannot see that such infirmity can be in any way cured by the provision not to contest. That provision relates to the issuance of the policy and the representations made to obtain it, and not to any subsequent transfer, disposition, or assignment of the policy. As to these matters, the stipulation has no reference or effect. It relates only to matters arising between the insurer ³⁵ and the insured, and not to matters in which third persons are concerned. The only provision in the policy as to assignments is the following: "Any assignment of this policy must be made in duplicate, and both copies must be sent to the home office, one of them to be retained by the company. The company has no responsibility for the validity of any assignment."

There is nothing in the policy as to who may be beneficiaries, nor as to whom assignments and transfers may be made, but it is clearly indicated that transfers and assignments may be made at the risk of the parties. We are, therefore, relegated to the general law of insurance to determine whether such transfer and assignment can be sustained. We think there can be no question but that the consideration for the transfer is sufficient as to amount and value, if it can be sustained on other grounds, and

the only question is, whether such transfer to one or more third persons, having no insurable interest, can be sustained under the rules of law and upon grounds of sound public policy. While the authorities are in hopeless conflict, the weight of authority is that one who takes out a policy upon the life of another, paying the premiums therefor himself, must have an insurable interest in the life of that other, or the policy will be a mere wager policy, upon which the party to whom it was issued cannot recover: See authorities collated in 3 Am. & Eng. Ency. of Law, 2d ed., 929.

³⁶ But the weight of authority is that when the insured contracts directly with the insurer, paying the premiums himself, he may designate as beneficiary one who has no insurable interest in his life: 3 Am. & Eng. Ency. of Law, 2d ed., 959.

So, also, the weight of authority is that when a policy has once been issued to a beneficiary legally entitled, he may assign it to another who has no insurable interest, either by a transfer in his lifetime or by a last will and testament: 3 Am. & Eng. Ency. of Law, 2d ed., 1025.

But while this is true, the transfer and assignment must be made in good faith, and not as a mere colorable evasion of the provision in regard to wagering contracts and in order to validate or legalize the same: 3 Am. & Eng. Ency. of Law, 2d ed., 1025, and notes; Mutual Protection Ins. Co. v. Hamilton, 5 Sneed, 269; Nye v. Grand Lodge, 9 Ind. App. 131; Rittler v. Smith, 70 Md. 261; Fairchild v. North Eastern Mut. Life Assn., 51 Vt. 613; Bursinger v. Watertown Bank, 67 Wis. 75, 58 Am. Rep. 848; Heinlein v. Imperial Life Ins. Co., 101 Mich. 250, 45 Am. St. Rep. 409, 25 L. R. A. 627, note; Carpenter v. United States Life Ins. Co., 161 Pa. St. 9, 41 Am. St. Rep. 880; Fitzpatrick v. Hartford Life Ins. Co., 56 Conn. 116, 7 Am. St. Rep. 288; Olmstead v. Keyes, 85 N. Y. 593; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496.

We think the facts in this case show that, while this policy was taken out by the assured, payable to his executors, et cetera, it was done under a pre-existing agreement with Clement and Kerr that they would pay the premiums and the other considerations named, and have the benefit of the policy, ³⁷ and the assignment to them was in furtherance of this agreement, and it was therefore a wagering policy. But it is said that if this be true, still the complainants can take under the will of the assured. It is doubtless true that anyone by will may bequeath the proceeds of a life policy, payable to himself or his executors or ad-

ministrators, to whom he pleases, and the fact that the legatee has no insurable interest will not defeat his right to receive under the will. But the parties complainant do not sue or seek to recover in this case as legatees or under the will of the insured. On the contrary, they expressly state, when asked the question, in making proof of death, under what title they claim, that they claim under the transfer and assignment. The provision in the will appears clearly to be an afterthought, an act to strengthen, consummate, and support the transfer, and was in furtherance of the original fraudulent contrivance and agreement to vest an interest in complainants. While we think the party procuring a policy is entitled to rely upon a provision against contest, and may transfer this right to anyone, whether having an insurable interest or not, provided he takes in good faith, we can see no reason for extending the benefit to one who, by fraud commenced before and consummated after the policy issues (by means of an unauthorized and illegal transfer), seeks to reap the same benefit. This would be to allow an easy evasion of the rule against the validity of wagering contracts: *Heinlein* ³⁸ v. *Imperial Life Ins. Co.*, 101 Mich. 250, 45 Am. St. Rep. 409, 25 L. R. A. 628, note.

It is argued, however, that the clause agreeing not to contest must have the effect to preclude any inquiry into the transfer and also the right of the transferee to take under the policy. We are of opinion, however, that the clause does not go to this extent and cannot have this effect. It is intended to cut off inquiry into the truth of the statements made by the assured in the application, and other matters going to the original validity of the policy, but not to any subsequent disposition of the policy, and the company expressly disclaims any responsibility for the validity of any assignment. There is nothing in this holding inconsistent with the ruling in the case of *Wright v. Mutual Ben. Assn. of America*, 118 N. Y. 237, 16 Am. St. Rep. 749.

In that case, Houghton, the original beneficiary, was a creditor of Wright, and had, therefore, an insurable interest in his life, and the policy was not, therefore, a wagering policy. After the death he assigned and transferred his interest in the policy to the widow of the insured, and the suit was brought in her name. The court held that she might recover the entire amount of the policy and adjust the rights of Houghton out of the proceeds, and make such other payments as equity demanded out of the proceeds. But there was no evidence of any fraud, either in the original issuance of the policy or in ³⁹ its subsequent transfer, and the whole matter appears to have been done in the utmost

good faith and with no purpose of carrying out a wagering policy.

While the court is disposed to give to the assured, and parties taking under him in good faith, the full benefit and advantage of the noncontestable clause, by shutting off inquiries into the truth or falsity of the statements made in the application, and this because of the contract between the parties, it can see no reason why the like advantage and benefit should be extended to one who has no insurable interest in the assured, who does not take or claim in good faith, and whose entire connection with the matter is shown to have been for a speculative and fraudulent purpose, and no sound public policy can be subserved by so holding, but, on the contrary, such holding would sanction wagering insurance contracts, to the great detriment of the public morals and public good. We are, therefore, of opinion the decree of the chancellor is correct in its results, and it is affirmed, and the bill dismissed at complainant's cost.

INSURANCE—LIFE—INCONTESTABILITY.—A stipulation in a certificate of life insurance "that no question as to the validity of the application or certificate of membership shall be raised, unless such question be raised within the first two years after the date of such certificate or membership and during the life of the member therein named," is valid, and excludes both the defense of fraud and the defense that the beneficiary had no insurable interest in the life of the insured: *Wright v. Mutual etc. Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749. That the insurance company is liable under a clause of incontestability when the insured commits suicide, even though the application stipulates that the insurer shall not assume liability for the death of the insured by his own hand, see *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411; *Mareck v. Mutual etc. Assn.*, 62 Minn. 39, 54 Am. St. Rep. 613.

INSURANCE—LIFE —WAGERING POLICY—ASSIGNMENT.—A policy of insurance on the life of another, taken by one who had an insurable interest in it, for the purpose of assigning it to a third person who had no such insurable interest, is void as a wagering policy in the hands of the assignee: *Keystone etc. Ben. Assn. v. Norris*, 115 Pa. St. 446, 2 Am. St. Rep. 572. See generally, on the validity of assignment of life insurance to one who has no insurable interest, the extended notes to *Equitable Life Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 906; *Currier v. Continental Life Ins. Co.*, 52 Am. Rep. 143; *Bursinger v. Bank*, 58 Am. Rep. 852.

TURCOTT v. RAILROAD.

[101 TENNESSEE, 102.]

LIMITATIONS OF ACTIONS—ABSENCE FROM STATE—CORPORATIONS.—A statute providing for the suspension of the running of the statute of limitations during the absence of a 'person' from the state applies to a corporation, and requires such absence as will prevent service of process.

CORPORATIONS.—THE RESIDENCE OF A CORPORATION is in the state of its creation.

LIMITATIONS OF ACTIONS—ABSENCE FROM THE STATE—FOREIGN CORPORATIONS.—A foreign corporation, doing business within a state, and having there agents upon whom process may be served, is not absent from the state within the meaning of a statute suspending the running of the statute of limitations in favor of a person out of the state, though it has failed to file and register its charter as required of foreign corporations doing business within the state before giving them the rights of domestic corporations.

CORPORATIONS—FOREIGN—FILING OF CHARTER—CONSTRUCTION OF STATUTE.—The purpose of a statute requiring foreign corporations doing business within the state to file and register their charters, is to enable them to do business, own or acquire property, and be able to sue, but not to exempt them from suit if they disregard the statute or to estop them from making defense if so sued.

Carroll, Chalmers & McKellar, for the appellant.

Fentress & Cooper, for the appellee.

103 WILKES, J. This is an action for damages for personal injuries inflicted in the shops of the defendant company at Vicksburg, Mississippi. The action was brought at Memphis, Tennessee, May 25, 1895, about one and one-half years after the injury was suffered. Demurrers were filed, and the declaration was amended. To the declaration, as amended, pleas of not guilty, contributory negligence, and the Tennessee statute of limitation of one year for injuries to persons were filed. The latter plea states in detail that the defendant company had been operating its road through the state of Mississippi into and in the state of Tennessee for fourteen years; that it had an office and agents in the city of Memphis, and on these agents service at any time could have **104** been had, and that at no time had there been any impediment or hindrance to the bringing of this, or any other suit against it, or to the service of legal process upon it.

To this plea there was a replication, in substance that the defendant is a foreign corporation, organized and existing under the laws of Mississippi, and that, at the time of the accrual of

this cause of action, it had no corporate or legal existence in Tennessee, because it had not complied with the requirements of the acts of 1891, chapter 122, as to the filing and registration of its charter, and, not having so complied until after the bringing of this suit, it cannot plead the statute of limitations of one year in bar of the suit. There was a demurrer to this replication, and the demurrer was sustained.

The exact questions presented are whether foreign corporations can plead and rely upon this Tennessee statute of limitation when they have offices and agents in the state subject to continuous service of process, and whether the failure to file and register its charter will deprive it of that right, if otherwise it would be held to have it.

Under the statutes of Tennessee (Shannon's Comp. Stats., 4469), it is provided, among other things, that actions for injuries to the person must be commenced within one year after the cause of action accrues, or be barred.

Section 4455 of Shannon's Compiled Statutes provides: "If, at any time, any cause of action shall accrue against any person who shall be out of this state, the action ¹⁰⁵ may be commenced within the time limited therefor, after such person shall have come into the state; and after any cause of action shall have accrued, if the person against whom it has accrued shall be absent from, or reside out of the state, the time of his absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action."

The word "person" includes a "corporation": Shannon's Comp. Stats., sec. 62. The exception made in this statute does not apply to a natural person unless his absence from the state is such as to prevent service of process: *Taylor v. McGill*, 6 Lea, 294, 301.

The statutes relating to service of process upon corporations are as follows:

"Service of process on the president, or other head of a corporation, or, in his absence, on the cashier, treasurer or secretary, or, in the absence of such officers, on any director of such corporation shall be sufficient": Shannon's Comp. Stats., sec. 4539.

"If neither the president, cashier, or secretary resides within the state, service on the chief agent of the corporation residing at the time in the county where the action is brought, shall be deemed sufficient": Shannon's Comp. Stats., sec. 4540.

No question is made but that there was ample opportunity to obtain service of process at any time on the defendant through

its officers and agents, nor that foreign corporations are liable to service under these sections: *Telephone Co. v. Turner*, 88 Tenn. 266.

¹⁰⁶ But the contention is, that a foreign corporation is out of the state, and resides out of the state, and so falls within the exception before stated, and that, while process may be made upon it, still it is optional with a party aggrieved whether and when he will commence his suit, and the bar of the statute cannot be set up if the suit is not brought within one year, and that it does not come within the state in legal contemplation, till it files and registers its charter. It appears that there is some conflict of decision upon the first question. The reason of the rule of law is, that no person who is not and has not been subject to service of process within the year, shall avail himself of its exemption: *Taylor v. McGill*, 6 Lea, 294. Unquestionably, the residence of a corporation is the state of its creation: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752. And if we should give the statute a strict, literal construction, it might be held that a foreign corporation was not entitled to the benefit of the limitation. Still the courts will not permit the literalism of the statute to thwart its obvious purpose, intent, and meaning. A thing may be within the letter of the statute, yet not within its operation if not so intended: *Taylor v. McGill*, 6 Lea, 294.

We think the true rule is laid down in *Murfree on Foreign Corporations*, and that the rule as thus laid down is based on sound reason and principle. In speaking of such foreign corporation pleading the ¹⁰⁷ statute of limitations, it is said (*Murfree on Foreign Corporations*, sec. 248): "As to the question whether a foreign corporation, when sued, can plead the bar of the statute in defense, it may be said that the great weight of authority is in favor of the conclusion suggested above; that the true test of the running of the statute is the liability of the party invoking its bar to the service of process during the whole of the period prescribed; that if the operations of the company within the jurisdiction were such as to render it liable to suit, then it may plead the statute. The principles upon which this doctrine rests have nowhere been more effectively expressed than in the decision of the Illinois appellate court, in *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364. Said Pleasants, J., who delivered the opinion of the court, after referring to a number of cases holding that a corporation must be considered an inhabitant of the state by which it is created: 'We should have no hesitation in approv-

ing these applications of the doctrine if there were no other element in the cases bearing on the question than the origin and nature of the corporation. For it is true that a positive law can never, of its own force, and ordinarily does not otherwise, operate beyond the territorial limits of the power by which it is enacted; and, hence, unless it is otherwise enabled, a corporation must indeed dwell in the place of its creation, and cannot migrate into another sovereignty. But the law of one state may have operation for certain purposes in another by the comity ¹⁰⁸ or permission of the latter, and we see no insuperable difficulty in the way of such migration, provided the former does not positively forbid and the latter does positively consent. It is conceded that, with such consent, they lawfully may, as they often actually do, remove their officers, agents, offices, and effects into another sovereignty, and there exercise their functions and franchises. In such a case, where is the corporation? If it be said that it still dwells in the place of its creation, and is acting elsewhere only by agents, the answer is no more by agents elsewhere than in the place of its creation. It can do nothing anywhere, nor manifest its presence or being at all, except through its agents, its property, or its operation. Where these are, then, it seems most accordant with substantial fact and reason to say, there is the corporation. Where these are not, we know of no means by which process can be served upon it; and if there be none, that fact would seem to be conclusive upon the question of residence for the time being, at least for purposes of judicial jurisdiction.’”

In Montana, it was held that the fact that a foreign company had subjected itself to a penalty by failing to file its charter or act of incorporation as required by the statute, though such failure did not disqualify it from being sued, did not thereby lose the right to plead the statute: See *King v. National etc. Co.*, 4 Mont. 1.

In support of the text, the author cites the following ¹⁰⁹ authorities: *Bank of U. S. v. McKenzie*, 2 Brock, 393. Compare *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248; *Holy Trinity Church v. United States*, 143 U. S. 457; *Huss v. Central R. R. etc. Co.*, 66 Ala. 472; *Lawrence v. Ballou*, 50 Cal. 258; *Express Co. v. Ware*, 20 Wall. 543; *Hall v. Vermont etc. R. R. Co.*, 28 Vt. 401; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *King v. National etc. Co.*, 4 Mont. 1; *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630; *Wall v. Chicago R. R. Co.*, 69 Iowa, 498; *McCabe v. Illinois Cent. R. R. Co.*, 4 McCrary,

492, 13 Fed. Rep. 827. See, also, *Winney v. Sandwich Mfg. Co.*, (Iowa, Dec. 17, 1891), 50 N. W. Rep. 565; *Koons v. Chicago etc. Ry. Co.*, 23 Iowa, 493. Compare *Abell v. Penn. Mut. Ins. Co.*, 18 W. Va. 400; *North Missouri R. R. Co. v. Akers*, 4 Kan. *453, 96 Am. Dec. 183; *Waterman v. Sprague Mfg. Co.*, 55 Conn. 554; *New York Cent. R. R. v. Estill*, 147 U. S. 608.

We are aware that New York, Nevada, Kansas, and possibly other states, do not follow this rule. It is said that such holding raises a discrimination against individuals and in favor of corporations. The argument is, that individuals cannot claim the exemption when they are out of the state or are nonresidents, and it would be inequitable to allow corporations out of the state or nonresidents to claim it. But this apparent difference arises out of the fact that individuals out of the state or residing out ¹¹⁰ of it, cannot be reached by process against a resident agent, while a corporation can; so that in the one case suit cannot be brought and in the other it may. Absence from the state, and residence out of the state, in the sense of the statute, means such absence and such nonresidence as renders it impracticable at all times to obtain service of process, so that, while a corporation's technical legal residence may be where it was created, its residence and status, for purposes of suit, will be where it can, through its officers and agents, be reached with process. While a corporation may reside beyond the state, and be out of the state, still it may, through its officers and agents, subject itself to the jurisdiction of the courts of the state. It may sue and be sued in a jurisdiction foreign to its technical residence.

Nor do we think the failure to comply with the act of 1891, chapter 122, will preclude this foreign corporation from setting up the statute.*

It would not be a proper construction of that statute to hold that a corporation actually doing business in the state without complying with the statute could not be sued for a tort committed, and, having been impleaded upon the ground of tort, it cannot be that the failure to comply with that statute must preclude it from making any defense, for it logically follows that if it cannot make this defense because of its failure, it can make no other.

The scope and purpose of that act was to require corporations to file and register their charters, ¹¹¹ in order that they might do business, own or acquire property, and be enabled to sue, but it was never intended to exempt them from suit if they disregarded the statute, nor to estop them from making defense if so

sued; otherwise their property might be taken from them, and they estopped to defend. This company was in the state owning property and doing business before the act was passed, and while this did not exempt it from a compliance with the act, in order that it might have all the rights of a domestic corporation, at the same time it was not the purpose nor the proper construction of that act that its property should be taken from it, or its right to defend actions brought against it should be cut off by its failure to comply with it.

Let the judgment be affirmed with costs.

LIMITATIONS OF ACTIONS—ABSENCE FROM STATE—CORPORATIONS.—A foreign corporation is a "person" within the meaning of the exceptions in the statute of limitations as to persons absent from the state: *North Missouri R. R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183; monographic note to *Moore v. Armstrong*, 36 Am. Dec. 73. Contra, *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248, but see the note thereto.

CORPORATIONS—RESIDENCE.—A corporation can have but one legal residence, and that must be within the state or sovereignty creating it: *Ireland v. Globe Milling etc. Co.*, 19 R. I. 180, 61 Am. St. Rep. 756, and note; *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232.

CORPORATIONS—FOREIGN—FILING OF CHARTER.—The failure of a foreign corporation engaged in business in the state to comply with its law by filing a copy of its articles of incorporation and the certificate of the appointment of an agent authorized to accept service of process cannot be taken advantage of by the corporation. In such case, valid service of process may be made upon its managing agent; *Foster v. Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859.

BROWN v. ELECTRIC RAILWAY COMPANY.

[101 TENNESSEE. 252.]

NEGLIGENCE—ACTION FOR DEATH OF HUSBAND—RELEASE BY HUSBAND.—A settlement and adjustment of a claim for personal injuries made by a deceased husband in his lifetime bars an action by his widow for his death resulting from such injuries.

MASTER AND SERVANT—ASSUMPTION OF RISK.—Danger from a bank or wall of earth falling is one open to common observation, and a servant engaged in excavating a ditch who, knowing that he is exposed to such danger, continues to work, assumes the risks and is not entitled to recover for injuries sustained.

Case & Case, for the appellant.

Brown & Spurlock, for the appellee.

253 WILKES, J. This is an action for personal injuries, resulting in the death of plaintiff's husband, Andrew Brown. Defendant introduced no evidence, but demurred to that of plaintiff, which was sustained by the trial judge and the suit dismissed, and the plaintiff has appealed and assigned errors.

The defendant, as one of his pleas, stated that the matter of damages arising out of this accident was compromised and settled with the deceased in his lifetime.

There was a replication to this plea, among other things, to the effect that this settlement was before the husband died, and before the plaintiff's right of action accrued, and was no bar to it. The court on motion, struck out this part of the replication, and this is assigned as error. There was no testimony on this feature of the case, and, under the shape it has assumed, it is not material to be considered. It may be said, however, that it was not error to strike out the replication, since if there had been a settlement and adjustment made by the deceased in his lifetime of his claim for damages, it would bar any subsequent action by the widow. Of course, the good faith and binding effect of such settlement could be put in issue as was done, but that also becomes immaterial under the demurrer, which raises and relies solely upon the theory that there was no cause of action to anyone arising out of the accident.

The facts as disclosed by plaintiff's proof are **254** that her husband was an illiterate negro, an ordinary laborer, but there is no proof that he was weak-minded or imbecile. He was employed with another to dig and uncover an escape pipe at or near the defendant's power-house, in an alley between the power-house and a frame house on the east of it. This alley was some ten feet wide. The ditch started in at a depth of three or four feet at the north, and deepened to seven feet or more at the edge of Seventh street. Beneath the surface the dirt to be excavated was loose for some distance and then there was clay, and it was thrown out, as excavated, on the east side of the ditch, next to the power building. There was a ledge of about three feet on which the dirt was banked up. There were no stays across or along the ditch, and no protection from its falling in or caving in.

It did fall in on Andrew Brown, while he was excavating at a place where it was about six feet deep, and crushed him so that he died. An expert engineer, Fritzwater, had charge of the work, and Brown was working under his directions and obeying

his orders. After the accident defendant took precautions to avoid further caving. The pipes were rusted.

It is insisted that this is not a case where the employé has full knowledge of the danger and assumes the risk; that he was an ignorant negro, and could not be presumed to know his danger from the character of the soil, which was filled in with cinders ²⁵⁵ and debris, nor that the banking of the dirt upon the narrow ledge would cause it to cave in; and that all these facts and the danger consequent on them were well known to the engineer and not communicated to the employé; that it was the duty of the employer to furnish a safe place to work in; that the work was done under the immediate supervision of the engineer who was present; that stays and supports for the excavation should have been provided and used; and that the evidence should have gone to the jury, especially in view of the ignorance of the deceased, as to whether he knew of the danger. The right of recovery is resisted on the idea that the danger, if any, was patent; that it could be appreciated and known by the weakest intelligence, and that the deceased, when he undertook the work, assumed the risks incident to it.

If the plaintiff in this case was aware of the danger attending his work, or it was so obvious and apparent that a man of ordinary intelligence would have seen it, then he must be held to have taken its risks and hazards, and would not be entitled to recover: Bailey's Personal Injuries, secs. 501, 502a, 796, 796a.

The witnesses state that the loose character of the soil and the banks was apparent, and the danger of their caving in must have been obvious to the most ordinary intelligence and to a common laborer. The witness, McCabe, says that it could be seen as you went down into the ground that it was ²⁵⁶ made earth, and any man of ordinary sense could see the kind of soil it was; that it was principally filled in with cinders, which was loose stuff, and the person who was digging could tell this better than anyone else. The witness, Gass, states substantially to the same effect, and says that any man of ordinary sense could tell whether he was digging through cinders or clay. It clearly appears, therefore, that the deceased knew the danger to which he was exposed, and continued to work, and in such cases he must be held to have assumed the risks, and is not entitled to recover for injuries sustained.

Danger from a bank or wall of earth falling is one open to common observation, and is a risk assumed by anyone walking thereon: Olson v. McMullen, 34 Minn. 95; Pederson v. Rush-

ford, 41 Minn. 290; Swanson v. Great Northern Ry. Co., 68 Minn. 184; Loughlin v. State, 105 N. Y. 159; Del Sejnore v. Hallinan, 153 N. Y. 274; Evans v. Council Bluffs, 65 Iowa, 238; Kranz v. Long Island Ry. Co., 123 N. Y. 5; Hughes v. Malden etc. Gas Light Co., 168 Mass. 396.

Let the judgment of the court below be affirmed with costs.

NEGLIGENCE—ACTION FOR DEATH—RELEASE.—If a statute makes the killing of a passenger of a railway corporation through gross negligence punishable by a penalty payable to a widow and children or next of kin, such passenger cannot release the corporation from liability, and therefore his agreement to do so cannot bar an action brought for his death by an administrator for the benefit of the persons entitled to the penalty: Doyle v. Fitchburg R. R. Co., 162 Mass. 66, 44 Am. St. Rep. 335. A sued B for assault and battery, and the suit was settled and dismissed. A died a few days afterward from the effects of the assault. Held, that A's widow was not barred of her action against B, under the statute, for damages for the killing: Donahue v. Drexler, 82 Ky. 157, 56 Am. Rep. 886.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—If defects complained of are as open and obvious to the servant as they are to the master, the servant cannot recover for an injury arising therefrom: Louisville etc. R. R. Co. v. Stutts, 105 Ala. 368, 53 Am. St. Rep. 127; Borden v. Daisy etc. Co., 98 Wis. 407, 67 Am. St. Rep. 816, and note. When a servant does not assume obvious risks: Maitland v. Gilbert Paper Co., 97 Wis. 476, 65 Am. St. Rep. 137, and note.

Of Actions for the Death of a Human Being.*

The proper limits of a note of this character are quite inadequate to the treatment of all the questions which have arisen in actions brought to recover damages for the death of another. The single matter of the measure and elements of damages in such actions is in itself a large subject, and, as it is discussed in a monographic note to Louisville etc. Ry. Co. v. Goodykoontz, 12 Am. St. Rep. 375-383, we shall not consider it herein. We shall also exclude from our discussion cases arising under civil damages acts passed in many states, giving to persons suffering through the intoxication of others, an action for damages against persons furnishing liquor to those through whose intoxication the suffering resulted. Our subject might easily be allowed to lap over the law of negligence as well as that of master and servant, but we shall endeavor to avoid such a result by omitting unnecessary excursions into related legal domains and by confining our attention to the mere right of action for the death of another, and to matters of practice and proceedings in the enforcement of such right.

The Right of Action is Statutory.—*Actio personallis moritur cum persona* is an important maxim of the common law. Under it the

***REFERENCE TO MONOGRAPHIC NOTES.**

Action for wrongful act causing death in another state: 14 Am. St. Rep. 353-355.
Elements and measure of damages in actions for death: 12 Am. St. Rep. 375-383.
Actions for injuries resulting in death: 48 Am. Dec. 632-641; 37 Am. Rep. 716-719.

right of recovery for injury resulting in death abates with the death of the person injured. It must be regarded as a proposition no longer open to question, though sometimes criticised and, less frequently, dissented from, that at common law no right of civil action for death was recognized or existed, and that such right of action, as it is known today, rests purely in statutory enactments: *Kahl v. Memphis etc. R. R. Co.*, 95 Ala. 337; *Kramer v. Market Street R. R. Co.*, 25 Cal. 434; *Kelly v. Union Pac. Ry. Co.*, 16 Cal. 455; *Hindry v. Holt*, 24 Colo. 464, 65 Am. St. Rep. 235; *Connecticut Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Western etc. R. R. Co. v. Strong*, 52 Ga. 461; *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698; *Chicago etc. R. R. Co. v. Schroeder*, 18 Ill. App. 328; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241, 49 Am. St. Rep. 192; *Connors v. Burlington etc. Ry. Co.*, 71 Iowa, 490, 60 Am. Rep. 814; *Dwyer v. Chicago etc. Ry. Co.*, 84 Iowa, 479, 35 Am. St. Rep. 322; *Eureka v. Merrifield*, 53 Kan. 794; *Winnegar v. Central Passenger Ry. Co.*, 85 Ky. 547; *Hubgh v. New Orleans R. R. Co.*, 6 La. Ann. 495, 54 Am. Dec. 565; *Hermann v. New Orleans etc. R. R. Co.*, 11 La. Ann. 5; *Van Amburg v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517; *State v. Grand Trunk Ry.*, 58 Me. 176, 4 Am. Rep. 258; *Carey v. Berkshire R. R. Co.*, 1 Cush. 475, 48 Am. Dec. 616; *Richardson v. New York Cent. R. R. Co.*, 98 Mass. 85; *Hyatt v. Adams*, 16 Mich. 180; *Amos v. Mobile etc. R. R. Co.*, 63 Miss. 509; *State v. Manchester etc. R. R.*, 52 N. H. 528; *Corliss v. Worcester etc. R. R.* 63 N. H. 404; *Grosso v. Delaware etc. R. R. Co.*, 50 N. J. L. 317; *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Lucas v. New York Cent. R. R. Co.*, 21 Barb. 245; *Woodard v. Michigan Southern etc. R. R. Co.*, 10 Ohio St. 121; *Pennsylvania R. R. Co. v. Adams*, 55 Pa. St. 499; *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206, 12 Am. St. Rep. 863; *Gulf etc. Ry. Co. v. Beall*, 91 Tex. 310, 66 Am. St. Rep. 892; *Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 714; *Thomas v. Union Pac. R. R. Co.*, 1 Utah, 232; *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294; *Insurance Co. v. Brame*, 95 U. S. 754; *Armstrong v. Beadle*, 5 Saw. 484; *Sullivan v. Union Pac. R. R. Co.*, 1 McCrary, 301, 2 Fed. Rep. 447.

Perhaps the only well-considered American dissent from this proposition is the opinion delivered by Dillon, C. J., in *Sullivan v. Union Pac. R. R. Co.*, 3 Dill. 334, in which that learned jurist denies the binding authority of Lord Ellenborough's statement in *Baker v. Bolton*, 1 Camp. 493, that "In a civil court, the death of a human being cannot be complained of as an injury." Judge Dillon points out that, since *Baker v. Bolton*, 1 Camp. 493, was determined in 1808, the decision therein is not binding upon the courts of this country as part of the common law. Considering the matter thus, Judge Dillon dissented from the proposition to which we have just cited authorities, so far as it applied to the case in hand. But his decision has since been reversed and robbed of its claim to authority

by later federal decisions cited above. In *Holmes v. O. & C. Ry. Co.*, 5 Fed. Rep. 75, Deady, D. J. said: "It is admitted that it came to be the rule at common law that an action will not lie to recover damages for the death of a human being. The maxim, *actio personalis moritur cum persona*, was held to apply. It is also admitted that the weight of authority in this country is with the English rule. But it is not admitted that the rule is founded in reason or is consonant with justice": See *The Garland*, 5 Fed. Rep. 924. So in *Van Amburg v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517, the common-law rule is adverted to in this wise: "Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man cannot be made the subject of valuation, and under the domination of that dogmatic utterance, made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the singular spectacle has been witnessed of courts sanctioning damages for short-lived pains, and refusing them for a life-long sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort, and even the necessary stays of life. Legislation has at last come to the relief of future sufferers." So in *Gulf etc. Ry. Co. v. Beall*, 91 Tex. 510, 66 Am. St. Rep. 892, the court considers itself bound by the rule stated in the preceding paragraph, though "none of the reasons assigned therefor seem entirely satisfactory," and "the reason for the original adoption of the rule . . . is involved in doubt and obscurity." And in *Maney v. Chicago etc. R. R. Co.*, 49 Ill. App. 105, the rule is criticised as allowing "a glaring absurdity in allowing a husband and father, if injured, but not killed, a right of action for the recovery of damages thus sustained, and denying to his widow and children any compensation for damages inflicted upon them should the injury be greater and result in his death."

That there is justice in some of these criticisms cannot be denied. In considering any proposition of law, the reasons upon which it is based cannot be overlooked. But it is of greater importance to lawyers to know what the law is than to know why it is what it is. That a proposition of law, though firmly established by authority, is not based upon reason, is a matter worthy of knowledge, because prophetic of the disappearance of the proposition from the body of the law, but should not lead one into mistake as to what the law is. Various reasons have been suggested for the common-law rule aside from the maxim that personal injuries die with the person. It has been said that by death the civil injury merges in the felony, but it is manifest that in the bulk of instances of death from injuries no felony is constituted. In *Hyatt v. Adams*, 16 Mich. 180, the court, per Christiancy, J., enters into a lengthy discussion of the reason of the rule in question, reaching the conclusion "that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been

strong and prevalent among nations in proportion as they have been or become more enlightened and refined, and especially so where the Christian religion has exercised its most beneficent influence and where human life has been held most sacred." The statutes passed quite generally in America are looked upon by the able justice as necessary concessions to the needs created by modern developments in modes of travel and business—concessions not unmixed with some incidental evils. "And it will be fortunate in the future," he concludes, "if it shall be found that habituating the public mind to the idea of pecuniary compensation for human life has not tended to weaken its safeguards, and to render it less sacred in popular estimation." For our own part we see little menace in this, certainly much less than we should see in a state of the law which encouraged negligent destruction of human life by providing no remedy therefor except where a felony was constituted.

Statutory Enactment and Construction.—Both in England and throughout the United States, statutes have been enacted abrogating the common-law rule which refused to allow the maintenance of an action against one who by wrongful act, neglect, or default, caused the death of another. The English statute (9 & 10 Vict., c. 93) was passed in 1846, and, being the earliest of this class of statutes, has served as a model for subsequent legislation directed toward the same end. It is commonly referred to as Lord Campbell's act. These statutes, being in abrogation of the common law, are strictly construed. The slightest variation in verbiage between two statutes may be of great importance in its effect upon the decisions thereunder. So it is well settled that only those persons named in the statute as proper parties plaintiff may sue: *Wilson v. Bumstead*, 12 Neb. 1; *Chicago etc. R. R. Co. v. Oyster*, Nebraska, Feb., 1899. The cases which adhere to this almost elementary rule derive their especial interest from their construction of various words and phrases. Where a statute designates the parties who may sue, and provides that the "heir or heirs" of the deceased may sue, if there is no husband or wife, or if he or she fails to sue within one year after the death, the words quoted mean "child or children," and do not include all those entitled to share in the estate of a person dying intestate. The right of action is, therefore, limited to lineal descendants: *Hindry v. Holt*, 24 Colo. 464, 63 Am. St. Rep. 235; *Jordan v. Cincinnati etc. R. R. Co.*, 89 Ky. 40. And in construing the word "heir" to mean "child or children," it is held to include adult as well as minor children: *Pennsylvania R. R. Co. v. Malla*, Kentucky Ct. of App., Feb. 1899. In a similar statute, "heirs" is held to be restricted to the widow and children of deceased, and does not include parents or collateral relatives: *Noble v. Seattle*, 19 Wash. 133. On the other hand, the words "heirs at law," as used in the Arkansas statute, are held to be used in contradistinction to devisees and to include all those entitled to share in the distribution, under the Arkansas statutes, of the personal

estate of persons dying intestate: *St. Louis etc. Ry. Co. v. Needham*, 10 U. S. App. 339, 52 Fed. Rep. 371.

Where a statute limits the right of action to lineal descendants of the deceased, his niece cannot sue: *Hindry v. Holt*, 24 Colo. 464, 65 Am. St. Rep. 235. Under a statute providing for an action by the widow or next of kin of deceased, a widower is not enabled to sue for the death of his wife, as he is not included in "the next of kin": *Western Union Tel. Co. v. McGill*, 57 Fed. Rep. 699; *Dickins v. Railroad Co.*, 23 N. Y. 158; *Drake v. Gilmore*, 52 N. Y. 389. The words "next of kin" are limited in legal meaning, as in common use, to blood relations, and do not include a husband or a wife unless accompanied by other words clearly manifesting a purpose to extend their signification: *Haraden v. Larrabee*, 113 Mass. 430. Though in Ohio it was held that "next of kin" used in a statute allowing an action for death included the widower of a deceased woman: *Steel v. Kurtz*, 28 Ohio St. 191. A statute allowing a wife to sue for the death of her husband does not authorize the latter to sue for the death of the former: *Grosso v. Delaware etc. R. R. Co.*, 50 N. J. L. 317; *Georgia R. R. etc. Co. v. Wynn*, 42 Ga. 331. If a right of action is given to the mother for the death of a minor child, the father cannot sue: *Frazier v. Georgia R. R. etc. Co.*, 96 Ga. 785. Where the right of action is given to the widow by statute, the personal representative cannot sue: *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; and, conversely, the widow cannot sue under a statute giving a right of action to the personal representatives of the deceased: *Weidner v. Rankin*, 26 Ohio St. 522; *Holston v. Coal etc. Co.*, 95 Tenn. 521; *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206, 12 Am. St. Rep. 863. Similarly, under a statute providing that actions for the widow and next of kin may in all cases be brought by the executor or administrator of the deceased, except that where there is a widow only she may sue in her own name, the father of a deceased minor cannot sue in his own name as next of kin: *Goodwin v. Nickerson*, 17 R. I. 478. See, also, *Fitzhenry v. Consolidated Traction Co.*, N. J. Sup. Ct., Feb., 1899; *Lovell v. De Bardelaben Coal etc. Co.*, 90 Ala. 13; *Eureka v. Merrifield*, 53 Kan. 794; *Scheffler v. Minneapolis etc. Ry. Co.*, 32 Minn. 125. The words "personal representatives" mean the administrator or executor of the deceased, and not the heir or next of kin: *Kramer v. Market Street R. R. Co.*, 25 Cal. 434; and such words do not include parent or child, or husband or wife. *Illinois Cent. R. R. Co. v. Hunter*, 70 Miss. 471; *Railroad v. Johnson*, 97 Tenn. 667. Where the right of action is given the distributees of a deceased person, his personal representatives cannot sue: *Hulbert v. Topeka*, 34 Fed. Rep. 510.

Under a statute authorizing a child to recover for the homicide of a parent, it has no right of action for the homicide of its stepfather: *Marshall v. Macon Sash etc. Co.*, 103 Ga. 725, 68 Am. St. Rep. 140. Conversely, a stepfather cannot sue for the death of a stepchild: *Hennessey v. Bavarian Brewing Co.*, 145 Mo. 104, 68 Am.

St. Rep. 554. A statute giving to parents the right to recover for the wrongful death of a minor child does not include a man who marries the mother of a bastard child: *Thornburg v. American Strawboard Co.*, 141 Ind. 443, 50 Am. St. Rep. 334; nor can the father or mother of an illegitimate child recover for its death: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185; *Marshall v. Wabash R. R. Co.*, 46 Fed. Rep. 269. The word "child," used in a statute giving an action to a father for the death of his child, is not equivalent to the word "minor," but is limited to such as occupy the position of child to a parent and are dependent upon the parent for support. It does not include a minor who is the head of a family: *Pittsburgh etc. Ry. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269. "Minor and unmarried," used in a statute, cannot be read "minor or unmarried" so as to allow parents to recover for the death of an adult unmarried son: *Isaac v. Denver etc. R. R. Co.*, 12 Daly, 340. A statute giving an action for the death of a "person" does not enable a recovery for the death of a child whose birth was hastened by an accident to its mother, and which survived only a few minutes: *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242; *Hawkins v. Front Street etc. R. R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72. "Widow or children, husband or father," does not include a mother so as to enable her to sue for the death of her minor child: *Amos v. Mobile etc. R. R. Co.*, 63 Miss. 509. It has been held in Texas that a stepfather may represent his wife's minor children as next friend in a suit for damages for causing the death of their father: *International etc. R. R. Co. v. Kuehn*, 70 Tex. 582.

Statutes quite generally aim to give dependent children a right of action for the death of a parent. "Minor heirs" cannot include children of age: *Huberwald v. Orleans R. R. Co.*, 50 La. Ann. 477. Where a statute gave an action for the benefit of "children" of a person killed through the wrongful act, neglect, or default of another, a child born after his father's death is entitled to have an action brought for his benefit: *Nelson v. Galveston etc. Ry. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81. Such a child is entitled to participate in the benefit of a judgment recovered for the negligent killing of its parent: *Texas etc. Ry. Co. v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 629. Whether or not an adult child may recover for the death of his parent depends in each case upon the wording and theory of the statute upon which recovery is sought to be based. Where the aim of the statute is to afford a remedy only to those children who are dependent upon their parent for support, an adult child cannot recover: *Mott v. Central R. R.*, 70 Ga. 680, 48 Am. Rep. 595; *St. Louis etc. Ry. Co. v. Johnston*, 78 Tex. 536. In Maryland, it was held that since the statute made no reference to the age or condition of the parties sought to be benefited, adult children might sue for the death of a parent: *Baltimore etc. R. R. Co. v. State*, 60 Md. 449. And the mere fact that children are adult and self-supporting does not, in a number of states, necessarily preclude a recovery by them for pecuniary loss consequent upon

a parent's death: *Lockwood v. New York etc. R. R. Co.*, 98 N. Y. 523; *Schnats v. Philadelphia etc. R. R. Co.*, 160 Pa. St. 602; *Tuteur v. Chicago etc. R. R. Co.*, 77 Wis. 505. Minor children may recover for the homicide of their mother under the Georgia statute authorizing a recovery by "a widow, or, if no widow, a child or children . . . for the homicide of a husband or parent": *Atlanta etc. R. R. Co. v. Venable*, 65 Ga. 55; but they have no such right of action where their father is alive: *Scott v. Central Railroad*, 77 Ga. 450. Brothers and sisters of a deceased person are not entitled to sue under a statute authorizing an action for the benefit of "husband or widow, or lineal descendants or ancestors": *Brown v. Chicago etc. Ry. Co.*, Wisconsin, Dec., 1898.

Plaintiff Must Bring Himself Within Statute.—Much of the matter included in the division of our note just finished might have been omitted had we been content to rest upon a mere statement of the rule that only the persons named in the statute may bring an action for the death of another. But a rule so general and absolute in its terms cannot be understood from a bare statement of it, so we have shown at considerable length the various applications of the rule which our courts have made. The particular thing evinced by such a recital is, that courts, without exception, apply a rule of strict construction to statutes giving a right of action for death. Another proposition, which directly results from this rule of construction, and which is an essential corollary to the rule that only the persons named in the statute may sue, is that one seeking to recover under a statute for the death of a human being must bring himself clearly within the terms of the statute: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185; and that the burden of proof is upon him to show the existence in fact of the relationship to the deceased necessary to the maintenance of the action: *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676. Thus, in Arkansas the father, if living, must sue for the death of a minor, and if the mother sues, she must show affirmatively and positively that the father is dead. A bare allegation that she is a widow is insufficient: *St. Louis etc. Ry. Co. v. Yocum*, 34 Ark. 493. Where the statute gives to a father and mother an action for the death of a "minor and unmarried" child, a petition failing to allege that the deceased was unmarried does not state a cause of action: *Dulaney v. Missouri Pac. Ry. Co.*, 21 Mo. App. 597. Compare *Barker v. Hannibal etc. R. R. Co.*, 91 Mo. 86. Generally, where the personal representatives of a deceased person are authorized to sue only for the benefit of the widow, children, or next of kin, the existence of such beneficiaries must be alleged: *Holton v. Daly*, 106 Ill. 131; *West Chicago etc. R. R. Co. v. Mable*, 77 Ill. App. 176; *Stewart v. Terre Haute etc. R. R. Co.*, 103 Ind. 44; *Schwarz v. Judd*, 28 Minn. 371; *Burlington etc. R. R. Co. v. Crockett*, 17 Neb. 570; *Serensen v. Northern Pac. R. R. Co.*, 45 Fed. Rep. 407. But such an allegation has been considered unnecessary because "a collateral fact of this character, the existence of which in almost all cases is common knowledge, will be presumed: Colum-

bus etc. Ry. Co. v. Bradford, 86 Ala. 574; and, by another court, on the ground that there is a presumption that every intestate leaves next of kin, and the party who wishes to negative the presumption must aver and prove it: Warner v. Western etc. R. R. Co., 94 N. C. 250. Where the personal representative is given a right to sue only for the benefit of certain designated beneficiaries, the existence of such beneficiaries will scarcely be presumed. The presumption in favor of the existence of next of kin or heirs cannot be reasonably stretched to cover such a case. Where the right of recovery is regarded as surviving the deceased and as becoming part of the assets of his estate, such right may be enforced by the personal representative for the benefit of the estate; Stewart v. Louisville etc. R. R. Co., 83 Ala. 493; and it would seem that in such a case the presumption of the existence of persons entitled to share in the estate as distributees would render a direct allegation of that fact unnecessary. This raises another matter relative to the theory of statutes giving actions for the death of human beings.

Two Classes of Statutes.—These statutes are divisible into: 1. Those which provide merely for the survival in favor of the estate or designated beneficiaries of the action which the deceased would have had in his own favor had he survived his injuries: and 2. Those which create an entirely new cause of action distinct from any that deceased might have had had he survived. The distinction between these two classes would be of greater importance to us were we to take up the matter of measure and elements of damages, but it has a limited influence upon our subject as we have defined it. We have already mentioned its pertinency to the matter of necessary allegations in petitions for relief under the statutes. If the statute merely provides for the survival of a right of action, it becomes necessary to determine that the deceased, at the moment of his death, had a right of action based upon his injuries and sufferings therefrom. If his death was instantaneous, no period of suffering intervening between his injury and his death, it is plain that under such a statute no action would survive. It would be paradoxical to say that a deceased person had a right of action for his own death. It would be difficult, in case of instantaneous death to determine at what point deceased's cause of action accrued, and also as to what is meant by the survival of such an action. But the theory of this class of statutes is not that they provide for the survival of a cause of action, but, instead, that they create a new cause of action which was unknown to the common law. This is the general rule, although there are exceptions to it: Schwarz v. Judd, 28 Minn. 371; Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515, 18 Am. St. Rep. 248; Brown v. Chicago etc. Ry. Co., Wisconsin, Dec., 1898. See citations under "The right of action is statutory," *supra*. Under such statutes the plaintiff is not regarded as representing the right of action which deceased would have had, but as suing in his own behalf for damages suffered through the death of the deceased: Morgan v. Southern Pac.

Co., 95 Cal. 510, 29 Am. St. Rep. 143; Pennsylvania R. R. Co. v. Vandever, 36 Pa. St. 298; Atchison etc. R. R. Co. v. Brown, 26 Kan. 443; Donaldson v. Mississippi etc. R. R. Co., 18 Iowa, 280, 87 Am. Dec. 391; Kansas Pac. Ry. Co. v. Miller, 2 Colo. 466; Hyatt v. Adams, 16 Mich. 180; Legg v. Britton, 64 Vt. 652. Though where the aim of the statute is to simply transmit to survivors the right of action which deceased would have had had he lived, the plaintiff stands in the stead of the deceased: Hennessey v. Bavarian Brewing Co., 145 Mo. 104, 68 Am. St. Rep. 554. In Kansas, the statute permits actions for injury to the person to survive only when death does not result from the injury, but occurs from other causes. Where, however, death results from the injury, a right of action is created for the benefit of the widow and children, or next of kin: Martin v. Missouri Pac. Ry. Co., 58 Kan. 475.

Instantaneous Death.—There can be no doubt that at common law no action existed for the instantaneous death of a human being. Where, however, deceased had an interval of conscious suffering, it has been held that his right of action survives for the benefit of his estate: Clare v. New York etc. R. R. Co., 172 Mass. 211; Winnegar v. Central Passenger Ry. Co., 85 Ky. 547. Compare Kelley v. Union Pac. Ry. Co., 16 Colo. 455. Where injuries to a child resulted in death, but not instantaneously, it was held that at common law the surviving mother might sue for the loss of the child's services and expenses incurred for medical attention, care, and nursing: Natchez etc. R. R. Co. v. Cook, 63 Miss. 38; Jackson v. Pittsburgh etc. Ry. Co., 140 Ind. 241, 49 Am. St. Rep. 192. Since the general theory of American statutes on this subject is, as we have said, that the action thereby newly created is entirely distinct from any action which the deceased might have had had he lived, it logically follows that the newly created action is not barred by the fact that the death of the deceased was instantaneous: Conners v. Burlington etc. Ry. Co., 71 Iowa, 490, 60 Am. Rep. 814; Worden v. Humeston etc. Ry. Co., 72 Iowa, 201; Givens v. Kentucky Cent. Ry. Co., 89 Ky. 231; Daly v. New Jersey Steel etc. Co., 155 Mass. 1; Reed v. Northeastern R. R. Co., 37 S. C. 42; Nashville etc. R. R. Co. v. Prince, 2 Heisk. 580, announcing a different rule from that adhered to in Louisville etc. R. R. Co. v. Burke, 6 Cold. 45; International etc. R. R. Co. v. Kindred, 57 Tex. 491. We find it declared that to entitle an administrator to sue under the Vermont statute it is not necessary that death should have resulted instantly from the injury complained of: Boyden v. Fitchburg R. R. Co., 70 Vt. 125; and that the remedies provided by the Maine statute are limited to cases where the injured person dies immediately: Sawyer v. Perry, 88 Me. 42. Where a statute was designed to cause to survive to the personal representative any right of personal action which the deceased might have commenced or prosecuted if living, it was logically held that an administrator could not sue for injuries causing the death of his intestate if the death was instantaneous: Illinois Cent. R. R. Co. v. Pendergrass, 69 Miss. 425; McVey v. Illinois Cent. R. R. Co., 73 Miss. 487; Belding

v. Black Hills etc. R. R. Co., 3 S. Dak. 369. Compare Dimmey v. Railroad Co., 27 W. Va. 32; 55 Am. Rep. 292.

Proper and Necessary Parties—Joinder.—We have already said that actions for death can be maintained only by the persons named in statutes as beneficiaries, and that, as a condition precedent to a recovery, a plaintiff must bring himself within the statute under which he sues. The discussion of these propositions is in point to the question, Who are proper parties? In Indiana, a father cannot maintain an action as administrator of his deceased minor son, unless there has been an emancipation of the infant: *Berry v. Louisville etc. R. R. Co.*, 128 Ind. 484; though under the Indiana statutes the father has a right to recover for the injury or death of his child: *Baltimore etc. Ry. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252. It is indispensable that the plaintiff sue in the proper capacity. Under the Illinois statute, a father may sue as administrator for the death of his minor child: *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553. The question as to who are necessary and proper parties depends entirely upon the particular statute under which suit is brought. The statutes of the different states, though modelled from Lord Campbell's Act, vary sufficiently in their terms to render it almost impossible anywhere in our subject to indulge in the statement of general propositions. It becomes, then, the first duty of the practitioner to consult the statute upon which he relies, for the rule of law that remedial statutes, though in abrogation of the common law, must be liberally construed to accomplish the end desired, has not been much observed in the interpretation of statutes giving an action for the death of a human being. On one hand it is held that where a right of action is given to the heirs at law of a deceased person for the benefit of the widow and next of kin, all the heirs at law are indispensable parties to the maintenance of the action: *St. Louis etc. Ry. Co. v. Needham*, 52 Fed. Rep. 371, 10 U. S. App. 339. On another hand a widow is allowed to bring suit for herself, and also for the use of her husband's parents without their knowledge or consent: *San Antonio etc. Ry. Co. v. Renken*, 15 Tex. Civ. App. 229. Compare *East Line etc. Ry. Co. v. Culberson*, 68 Tex. 664. Under the Pennsylvania statute, the widow in such case has the sole right of action: *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95. In Tennessee, children are unnecessary parties to a suit brought by the widow or administrator: *Collins v. East Tennessee etc. R. R. Co.*, 9 Helsk. 841. Generally, where an action is given to the father and mother, as parents, for the death of a minor child, it is not necessary that they be joined as parties plaintiff. Either may sue alone: *Pierce v. Conners*, 20 Colo. 178, 46 Am. St. Rep. 279; but there is no impropriety in their suing jointly: *Texas etc. Ry. Co. v. Hall*, 83 Tex. 675. A married woman deserted by her husband may maintain an action in her own name for the death of a minor child of herself and husband: *Kerr v. Pennsylvania R. R.*, 169 Pa. St. 95. Where a statute provides that the "action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents" of deceased, grandchildren are neither

necessary nor proper parties to the suit; Dallas Rapid Transit Ry. Co. v. Elliott, 7 Tex. Civ. App. 216. Where a widow sues for the death of her husband, there is no misjoinder of parties plaintiff if she sues individually and as guardian of a minor child, the issue of her marriage with deceased: Helm v. O'Rourke, 46 La. Ann. 178.

Dependency and Expectation of Benefits.—In Georgia, a mother or father cannot recover under the statute for the death of a child, unless it be shown that such mother or father was dependent upon such child for support, and that such deceased child contributed to the support or maintenance of the mother or father: Clay v. Central R. R. etc. Co., 84 Ga. 345. It is sufficient that a mother was partially dependent upon a deceased son, though her husband also contributed to her support: Daniels v. Savannah etc. Ry. Co., 86 Ga. 236; Richmond etc. R. R. Co. v. Johnston, 89 Ga. 560; as where all of a family reside together and labor for their mutual support, the proceeds of the labor of the minor child going into the common stock: Augusta Ry. Co. v. Glover, 92 Ga. 132; Atlanta etc. Ry. Co. v. Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145. Where, however, a son, while serving a term in the penitentiary, was unlawfully killed, but at the time of his death was not actually contributing to his father's support, the latter could not recover for the homicide: Smith v. Hatcher, 102 Ga. 158. Where the deceased for years prior to his death had voluntarily cared for and supported his aged mother, a minor sister, and a minor niece, all of whom were without property or means of support, such support in the past gave them a reasonable expectancy of its continuance in the future; and, when coupled with the disabling advanced age of the mother, and the disabling minority of the others, and their want of property means, conferred upon them the right to recover under the statute as "dependents for support": Duval v. Hunt, 34 Fla. 85. It is not necessary that deceased should have been legally bound to support the plaintiff, provided there was a reasonable expectation of support or benefit: Chicago etc. R. R. Co. v. Branyan, 10 Ind. App. 570; Daly v. New Jersey Steel etc. Co., 155 Mass. 1; Winnt v. International etc. R. R. Co., 74 Tex. 32; Railroad Co. v. Barron, 5 Wall. 90; Boyden v. Fitchburg R. R. Co., 70 Vt. 125. Under the Colorado statute, it need not appear that plaintiff was dependent upon the person killed for support: Brennan v. Molly Gibson etc. Milling Co., 44 Fed. Rep. 795. See, also, Howard v. Delaware etc. Canal Co., 40 Fed. Rep. 195. Where an action is given next of kin for pecuniary damages resulting from the death of their relative, a reasonable expectation ~~of~~ benefit from deceased had he lived will support an action; Grotenkemper v. Harris, 25 Ohio St. 510; Pennsylvania R. R. Co. v. Adams, 55 Pa. St. 499. The mere receiving of occasional assistance does not show dependency for support upon the wages of deceased, under the Massachusetts statute: Hodnett v. Boston etc. R. R. Co., 156 Mass. 86. Compare Houlihan v. Connecticut River R. R. Co., 164 Mass. 555; Schnatz v. Philadelphia etc. R. R., 160 Pa. St. 602. Under a statute

allowing an action by a child for the death of its parent, the word "child" includes only those occupying the position of child to a parent and dependent upon the parent for support. It does not include a minor who is the head of a family: *Pittsburgh etc. Ry. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269. Nor can parents sue for the death of a child, free by age or emancipation, who contributed in no way to their support: *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95.

Nature of Injury.—An injury to a person resulting in his death cannot give to beneficiaries under a statute allowing an action for such injury any better basis for a recovery than deceased himself would have had had he survived. It is generally held under statutes modeled from Lord Campbell's act that no actions may be had thereunder for injuries resulting in death, unless the injury be of such a nature that deceased himself, had he lived, might have sued therefor: *Spiva v. Osage Coal etc. Co.*, 88 Mo. 68; *Quincy Coal etc. Co. v. Hood*, 77 Ill. 68; *Texas etc. R. R. Co. v. Berry*, 67 Tex. 238. The applications of this rule are various. Thus, it may be stated that, in such an action brought by a beneficiary under the statute, all the defenses which would have availed had the action been brought by deceased are available to the defendant: *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259. These defenses include matters going to the cause of the injury, the nature of defendant's negligence, contributory negligence on the part of deceased, and matters of defense peculiar to the law of master and servant, all of which matters fall outside the scope of this note. In *Sheffer v. Railroad Co.*, 105 U. S. 249, it appeared that deceased had been injured in a railway collision, and, becoming thereby disordered in mind and body, after an interval of eight months committed suicide. His representatives sued for his death, but were denied a recovery, the court relying upon the doctrine of proximate cause. In Rhode Island, it was held that a statute giving a cause of action for death "inflicted by the wrongful act of another" does not embrace the case of mere passive neglect or omission of duty: *Bradbury v. Furlong*, 13 R. I. 15, 43 Am. Rep. 1; and, under the same statute, that no action would lie for the death of a wife brought about by detaining her from her husband and slandering him: *Nellson v. Brown*, 13 R. I. 651, 43 Am. Rep. 58. In the last case cited, the court concluded thus: "We understand that statute to give a right of action in those cases in which, at common law, an action might have been maintained for the injury from which death resulted; but death could result from no injury, unless an injury to the deceased person, and for such injury only the deceased person could have maintained an action. It follows, therefore, that no action can be maintained under this statute, except in cases where the deceased person, had he lived, would have had an action. In this case, the count alleges that the wife was by persuasion detained from her husband, and slanderous and false statements regarding him and her marriage were made to her. It seems clear that for these acts no action could have been maintained by the

wife or for her use, and therefore the present action must fail." See, also, *Vawter v. Hultz*, 112 Mo. 633.

State Statutes in Federal Courts—Marine Torts.—Actions for death based upon state statutes, are often brought in federal courts, generally where death resulted from a marine tort. It was formerly doubted that admiralty courts were obliged to adhere to the common-law rule denying actions for death, and held that such an action might be brought in admiralty in the absence of statute, but this doubt has been removed by the federal supreme court, and statutory authority is now necessary to the maintenance of such an action in admiralty, as in other courts. A statute of a seaboard state giving an action for wrongful death will support an action for wrongful death on the high seas within three miles of the state shore, brought in an admiralty court: *In re Humboldt etc. Assn.*, 60 Fed. Rep. 428, where, by the state's constitution and laws, her boundaries extend three miles beyond the seashore: *Humboldt Lumber etc. Assn. v. Christopherson*, 73 Fed. Rep. 239. Such a statute will support an action in rem in a federal court of admiralty for death resulting from negligence on the part of a steamboat navigating a river of the state: *The St. Nicholas*, 49 Fed. Rep. 671. It was held in that case that it was unnecessary for the state statute to create a lien upon a vessel for the liability sought to be enforced: Compare *The Willamette*, 59 Fed. Rep. 797; *Holmes v. O. & C. Ry. Co.*, 5 Fed. Rep. 75. Where there is no such lien created, an admiralty court may enforce the liability in personam: *The City of Norwalk*, 55 Fed. Rep. 98; but the liability is not enforceable by a libel in rem, except where such lien is created: *The Corsair*, 145 U. S. 335; *Welsh v. The North Cambria*, 40 Fed. Rep. 655; *The Wydale*, 37 Fed. Rep. 716; *The Glendale*, 81 Fed. Rep. 633. While a state statute may cover the case of death occurring through negligence upon navigable waters within the state's jurisdiction (*Sherlock v. Alling*, 93 U. S. 99), it cannot embrace the case of death on the high seas beyond the territorial limits of the state: *Armstrong v. Beadle*, 5 Saw. 484. Compare *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664, where it was held that the laws of the state to which a vessel belongs may be regarded as following her upon the high seas until she comes within the jurisdiction of some other government, and that a state statute giving an action for wrongful death covers the case of a death from negligence, upon the high seas, on a vessel hailing from, and registered within, the state. The right to recover the penal sum of five thousand dollars provided by the Missouri statute for occasioning death by negligence, unskillfulness or criminal intent, cannot be enforced in a federal court in another state, the rule applying that penal statutes are only enforceable in the sovereignty of their creation: *Marshall v. Wabash R. R. Co.*, 46 Fed. Rep. 269.

Bar or Abatement of Action—Matters Relating Thereto.—The right of action which one spouse is given for the death of the other is not affected by his or her remarriage subsequent to such death: *Georgia R. R. etc. Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492; *International*

etc. R. R. Co. v. Kuehn, 70 Tex. 582; Gulf etc. Ry. Co. v. Younger, 90 Tex. 387; Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548. This is upon the ground that "a right of action arises at the time of death to recover just what was lost by it; and that the loss thus occasioned is none the less, even though the injured party thereafter acquire, through his own skill or industry or the charity or affection of others. more than he lost": Railway Co. v. Maddry, 57 Ark. 306. Where two persons married while slaves, and continued to live together until after the enactment of a statute confirming slave marriages for all civil purposes, then separated, each marrying another, it was held that the woman still remained the lawful wife of the first husband and could recover for his wrongful death: Thomas v. East Tennessee etc. Ry. Co., 63 Fed. Rep. 420. Nor is a widow's action for her husband's death barred by the fact that she married him after he had received the injury which resulted in his death: Gross v. Electric Traction Co., 180 Pa. St. 99. In Texas, it is held that a wife under a common-law marriage, and the issue thereunder, are entitled to recover for the death of the husband and father: Galveston etc. Ry. Co. v. Cody, Tex. Civ. App., Feb., 1899. The remarriage of a woman, and the assumption by the husband of the duties of stepfather toward her child, do not affect her right to sue for the wrongful death of such child: Hennessey v. Bavarian Brewing Co., 145 Mo. 104, 58 Am. St. Rep. 554. A wife, though living in separation from her husband, is not prevented from maintaining an action for his death: Dallas etc. Ry. Co. v. Spieker, 61 Tex. 427, 48 Am. Rep. 297. This is true although the separation was for the twelve years preceding his death, during which time he contributed nothing to the support of his family: Baltimore etc. R. R. Co. v. Chambers, 81 Md. 371.

Bar or Abatement of Action—Former Recovery.—The usual aim of statutes creating a right of recovery for wrongful death is to allow only one action for an injury resulting in death. This, however, is not always true, as we shall see, but when it is plain from the language and intendment of the statute that only one action is allowed, a suit by one of the beneficiaries named in the statute is a bar to any subsequent action by other beneficiaries: Munro v. Pacific Coast Dredging Co., 84 Cal. 515, 18 Am. St. Rep. 248; Lubrano v. Atlantic Mills, 19 R. I. 129; Hartigan v. Southern Pac. Co., 86 Cal. 142; Beard v. Skeldon, 113 Ill. 584; Galveston etc. R. R. Co. v. Le Gierse, 51 Tex. 189; Paschal v. Owen, 77 Tex. 583; St. Louis etc. Ry. Co. v. Needham, 10 U. S. App. 339, 52 Fed. Rep. 371; Ewell v. Chicago etc. Ry. Co., 29 Fed. Rep. 57; Louisville etc. R. R. Co. v. McElwain, 98 Ky. 700, 56 Am. St. Rep. 385; Legg v. Britton, 64 Vt. 652. In placing such construction upon the Arkansas statute, Sanborn, C. J., in St. Louis etc. Ry. Co. v. Needham, 10 U. S. App. 339, 52 Fed. Rep. 371, said: "It gives 'an action,' a single action, not several actions for the wrongful killing. It provides that every such action must be brought in the name of the personal representatives, if there are such; otherwise, by the heirs-at-law. It will not be gravely insisted that the personal representatives

could maintain more than a single action, or that, where there are several administrators, one of them could maintain the action without joining all; and it is equally clear that when the action is brought by the heirs there must be but a single action, and all the heirs must be made parties to it, so that the entire controversy may be determined and the entire amount recovered and distributed in the single action given by the statute. The simplicity and effectiveness of such an action, the inconvenience and injustice to the plaintiffs and defendants alike resulting from any other practice; the rule of distribution of the amount recovered, based, not upon the injury to each person entitled to receive a share, but upon the statute of descents; the settled rule of law as to parties jointly interested in a cause of action, and the plain reading of the statute, compel the conclusion that such was the intention of the legislature." Where, under such a statute, two actions are begun, one by the personal representative, the other by the widow, the defendant may elect which he will defend, and plead the pendency of either in bar of the other: *Henderson v. Kentucky Cent. R. R. Co.*, 86 Ky. 389. Under these statutes, a common-law recovery for suffering of the deceased intervening between his injury and his death bars the statutory action by beneficiaries: *Conner v. Paul*, 12 Bush, 144. For contrary holdings, see *Clare v. New York etc. R. R. Co.*, 172 Mass. 211; *Nelson v. Galveston etc. R. R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81; *Bowes v. Boston*, 155 Mass. 344; *Hedrick v. Ilwaco R. R. etc. Co.*, 4 Wash. 400. Where plaintiff's intestate was killed, and his horses and wagon destroyed, in a collision with defendant's train, a suit by the administrator to recover for the death of his intestate is not barred by a former recovery by the same plaintiff of the value of the horses and wagon: *Peake v. Baltimore etc. R. R. Co.*, 26 Fed. Rep. 495. But a widow's right of action is barred by a recovery of judgment had by her husband for his injuries: *Legg v. Britton*, 64 Vt. 652. See, also, *Hecht v. Ohio etc. Ry. Co.*, 132 Ind. 507.

Bar or Abatement of Action—Compromise or Release.—Under purely survival statutes, or those preserving for the benefit of designated beneficiaries only the right of action which deceased would have had had he lived, a release or compromise for value executed by the deceased before his death is a good defense to an action brought by the beneficiaries under the statute after his death: *Hill v. Pennsylvania R. R. Co.*, 178 Pa. St. 223, 56 Am. St. Rep. 754; *Price v. Railroad Co.*, 33 S. C. 556, 26 Am. St. Rep. 700; *Brown v. Electric Ry. Co.*, 101 Tenn. 252; ante, p. 666. Only a minority of our various statutes, however, belong to the class known as survival statutes. Where a statute creates a new cause of action, distinct from that which deceased might have had, a cause of action, not alone for injuries, but for death, and vests it in designated beneficiaries, aiming to compensate them for loss through the fact of deceased's death, a release or compromise by deceased before his death cannot logically bar an action by the beneficiaries for the death of the deceased: *Hurst v. Detroit City Ry.*, 84 Mich. 539; *Illinois Cent. etc. R. R. Co. v. Cozby*, 69 Ill. App. 256; *Maney v. Chicago etc. R. R.*

Co., 49 Ill. App. 105; Pittsburgh etc. R. R. Co. v. Hosea, 152 Ind. 412. Where a statute makes the killing of a passenger of a railway corporation through gross negligence punishable by a penalty payable to the widow and children or next of kin, such passenger cannot release the corporation from liability, and therefore his agreement to do so cannot bar an action brought for his death by an administrator for the benefit of the persons entitled to the penalty: Doyle v. Fitchburg R. R. Co., 162 Mass. 66, 44 Am. St. Rep. 335. As has been said above, it is commonly held that no action for death can be maintained, except where deceased himself could have sued had he survived. When the right of action given by statute, while not simply that which deceased would have had, depends upon the right of deceased to have sued, it is sometimes held that a release or compromise by deceased before his death, if sufficient to have barred his own right of action, bars, also, that of the statutory beneficiaries: Sykora v. Case etc. Machine Co., 59 Minn. 130; Price v. Railroad Co., 33 S. C. 556, 26 Am. St. Rep. 700.

It is somewhat difficult to combat the logic which leads to such a conclusion. The rule, however, that no action for wrongful death is maintainable, except where deceased himself could have sued had he survived, applies to, as indeed it grew out of, matters pertaining to the nature and cause of the injury which resulted in death. Was the negligence or wrongful act of defendant the proximate cause of the injury? If not, deceased could not have recovered against him, nor can his successors under the statute. Did deceased's contributory negligence cause the injury? If so, any action for such injury is similarly barred. If the relation of master and servant subsisted between deceased and defendant, was the injury resultant from the act or neglect of a fellow-servant, or was it, for any reason arising out of the rules of master and servant, such an injury as gave rise to no liability on the part of the defendant? If this is answered affirmatively, and in the two cases mentioned before, no cause of action ever arose which was susceptible of release or compromise. Where, however, a cause of action does arise, and the injured person has a period of suffering and expense, there seems no reason that he should not be able, while living, to make an adjustment of his claim with defendant which would bar a recovery by his beneficiaries after his death upon the same claim. But the action given under other than survival statutes is entirely distinct from the action which deceased had at the moment prior to his death. It is an action for damages arising from the mere fact of death, not damages to the deceased, but damages to his successors under the statute. Therefore, we cannot comprehend the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons. It would be necessary to support such a conclusion that we admit that a person has a right of action for his own death. A greater degree of absurdity would not be attained in the enactment of a statute making suicide punishable as murder in the first degree.

Where a right of action for death is vested in the personal representatives of the deceased for the benefit of the widow or children and next of kin, the personal representative may bind the beneficiaries by a release or compromise of the claim out of court: *Parker v. Providence etc. Steamboat Co.*, 17 R. I. 376, 33 Am. St. Rep. 869; *Hartigan v. Southern Pac. Co.*, 86 Cal. 142. An administrator's suit for injuries resulting in his intestate's death, brought on behalf of the widow and children, cannot be compromised by the widow alone, without the consent of the administrator or the concurrence of the other beneficiaries: *Railroad Co. v. Acuff*, 92 Tenn. 26; *Yelton v. Evansville etc. R. R. Co.*, 134 Ind. 414; *Dowell v. Burlington etc. Ry. Co.*, 62 Iowa, 629. Compare *South etc. R. R. Co. v. Sullivan*, 59 Ala. 272. Where the administrator, after instituting the suit, resigned, and the suit is continued in the name of the widow for the use and benefit of herself and child, she may settle the suit as she sees fit, without the consent of the child's guardian: *Stephens v. Nashville etc. Ry.*, 10 Lea, 448. A widow may compromise and settle the action given to her and the husband's next of kin for the husband's death, either before or after she has instituted suit, and the other beneficiaries will be bound: *Holder v. Railroad*, 92 Tenn. 141, 36 Am. St. Rep. 77; *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672. But a contrary rule is maintained in *Southern Pac. Co. v. Tomlinson*, 163 U. S. 369; *Houston etc. Ry. Co. v. Bradley*, 45 Tex. 171; *Galveston etc. R. R. Co. v. Glerse*, 51 Tex. 189. Where a railroad employé entered into a contract with the relief department of the company to the effect that the acceptance of benefits from such department for injury or death should operate as a release of all claims against the railroad company arising from such injury or death, the acceptance of benefits from the relief department by his widow, who was the sole beneficiary named in the contract, will not bar a recovery for the wrongful death of the decedent for the use of his child: *Pittsburgh etc. Ry. Co. v. Moore*, 152 Ind. 345; *Chicago etc. R. R. Co. v. Wymore*, 40 Neb. 645. The true rule would appear from all the authorities to be that one of the beneficiaries cannot, by release, compromise, or settlement, prejudice the other beneficiaries, or conclude them, unless the sole right of action is vested in him.

Bar or Abatement of Action—Death—Miscellaneous.—Where a parent, entitled to bring an action of tort for the homicide of a son, dies without having instituted suit, the right of action does not survive to the administrator of such parent: *Frazier v. Georgia R. R. etc. Co.*, 101 Ga. 77. Similarly, an action by a husband for the death of his wife abates on the death of the husband: *Harvey v. Baltimore etc. R. R. Co.*, 70 Md. 319. Where a father, having brought suit for the death of his son, died while the action was pending and before judgment, it was held that his right of action did not survive to his heirs: *Chivers v. Rogers*, 50 La. Ann. 57; *Huberwald v. Orleans R. R. Co.*, 50 La. Ann. 477. The Texas statutory action for injuries resulting in death does not survive against the estate of the wrongdoer, where no action was commenced against him in

his lifetime: *Johnson v. Farmer*, 89 Tex. 610. This is in accordance with the maxim, *actio personalis moritur cum persona*: *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25; *Noe v. Smiley*, 125 Pa. St. 136; *Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523; *Hamilton v. Jones*, 125 Ind. 176; *Green v. Thompson*, 26 Minn. 500. There can be no doubt of the correctness of these decisions. Of course, it is by the abrogation of the maxim quoted that actions for death are maintainable, speaking broadly, but such abrogation is only with especial reference to the allowance of such actions. Having been created, such an action is merely a personal one, subject to the usual rule of abatement by death of one or both the parties to it. In a number of states, the survival of this class of actions for the benefit of successors of the plaintiff against the successors of the defendant is provided for by statute, but in the absence of such enactment the usual rules as to abatement apply: *Pennsylvania Co. v. Davis*, 4 Ind. App. 51; *Johnson v. Farmer*, 89 Tex. 610. Where a person is killed through the wrongful act or neglect of another, and leaves none of the beneficiaries named in the statute, the statutory action for his death does not arise. It cannot be enforced by creditors of the deceased: *Railway Co. v. Lilly*, 90 Tenn. 563. The Arkansas statute relating to married women, providing that their earnings shall be their sole and separate property, does not divest a husband of the right to his wife's services, nor, where her death has been caused by negligence, preclude him from recovering for the loss of such services: *St. Louis etc. Ry. Co. v. Henson*, 58 Fed. Rep. 531.

Statute of Limitations.—At common law the rule was that no liability for murder arose unless deceased died within a year and a day from the time of his injury. This limitation, however, does not apply to actions for death: *Louisville etc. R. R. Co. v. Clarke*, 152 U. S. 230; *Schlichting v. Wintgen*, 25 Hun, 626. In perhaps every state there is a special statutory limitation as to the time within which an action for death must be brought. It would not be worth while here to collate these various provisions, as a practitioner will be able to examine the statute of his own state. Suffice it to say that the period fixed by statute is absolute, and that no delay beyond such period will be allowed to be explained: *Taylor v. Cranberry Iron etc. Co.*, 94 N. C. 525; *George v. Chicago etc. Ry. Co.* 51 Wis. 603. The minority of the plaintiffs does not prevent the running of the statute: *Bledsoe v. Stokes*, 1 Baxt. 312; *Louisville etc. R. R. Co. v. Sanders*, 86 Ky. 259; *Foster v. Yazoo etc. R. R. Co.*, 72 Miss. 886; though it is not probable that the statute would be held to run against a minor, except where there is some one in existence authorized to sue for his benefit. An administrator's right of action for the death of a minor begins to run from the time of death: *Murphy v. Chicago etc. Ry. Co.*, 80 Iowa, 26. It was held that where a posthumous child is entitled to recover damages for the death of its father, the statute of limitations does not begin to run against him from the time when the cause of action accrued, merely because his mother was capable of commencing suit at that time:

Nelson v. Galveston etc. Ry. Co., 78 Tex. 621, 22 Am. St. Rep. 81. The time at which the statute of limitations begins to run will depend generally upon the wording of the particular statute under which suit is brought. The general and reasonable rule is, that it runs from the time of the death and not from that of the injury: Hanna v. Jeffersonville R. R. Co., 32 Ind. 113; Louisville etc. R. R. Co. v. Clarke, 152 U. S. 230; Nestelle v. Northern Pac. R. R. Co., 56 Fed. Rep. 261. Compare Fowlkes v. Nashville etc. R. R. Co., 9 Heisk. 829; Rugland v. Anderson, 30 Minn. 386. A declaration in an action under the statute for causing the death of a person is sufficient after verdict, where it alleges the time of death, but does not allege specifically that the action is not barred: Hill v. New Haven, 37 Vt. 501, 88 Am. Dec. 613.

GANN v. RAILROAD.

[101 TENNESSEE, 380.]

APPEAL—IMMATERIAL ERROR.—On appeal, the court will not review the action of the lower court in admitting evidence as part of the *res gestae*, where the admission or rejection of such evidence would not affect the case or change the result.

RAILROAD COMPANIES—INJURIES TO SERVANTS—FELLOW-SERVANTS.—While a section foreman and his subordinates generally occupy the position of vice-principal and servants as to each other, yet such foreman may become the fellow-servant of his subordinates during the performance of work properly that of a fellow-servant, as by handling the brake on a hand-car used by the section gang. While engaged in such work the principal is not liable for injuries resulting to a member of the section gang from the foreman's negligence.

RAILROAD COMPANIES—INJURIES TO SERVANTS—SAFE APPLIANCES—NEGLIGENCE OF SECTION FOREMAN. In the matter of providing safe appliances for the use of his subordinates, a section foreman bears to such subordinates the relation of a vice-principal, and for his negligence in this regard the company is liable.

RAILROAD COMPANIES—INJURIES TO SERVANTS—ASSUMPTION OF RISKS.—A section hand who continues to use a hand-car, the brake on which he knows to be dangerously defective, assumes the risk arising from such defect and cannot recover for injuries resulting therefrom.

W. T. Murray and B. F. Tatum, for the appellant.

W. D. Spears, for the appellee.

381 WILKES, J. This is an action for personal injuries, tried by the court and jury, and resulting in a verdict and judgment for plaintiff for twelve hundred and fifty dollars. The defendant railroad has appealed and assigned errors.

The first error assigned is to the admission of certain statements made by Cox, immediately after the accident occurred, as to the cause of it, and how it happened. It is insisted they were not part of the *res gestae*, and were, therefore, inadmissible. We need not pass upon this assignment, as the statements made by Cox would not change the result of the case or place it in any different light than if they had been rejected.

It is next insisted that the negligence which caused the accident in this case was the personal negligence of Cox, and not official negligence, and that the court not only failed to make the proper distinction between the two classes of cases, but refused to charge a request which would have pointed out the difference.

It appears that Cox was a section boss and Gann was a section hand under him; that Cox had authority and control over Gann; that he was subject to his orders; that Cox had the right to employ and discharge at will, and had complete control of the section and hands upon it.

³⁸² It appears that Cox one evening ordered the section hands to get on a hand-car, to go to a point on the road known as "Ramsey's Bottom," to measure up a lot of old iron. Cox, as was his custom, took a position at the brake, for the purpose of holding it and guiding the movements of the car. Gann and the other hands, under direction of Cox, operated the propelling lever which drove the car. The accident occurred on a steep down grade, and the car was running at about fifteen miles an hour. The brake was a peculiar one, and appears to have been of Cox's own invention. The main insistence is, that Cox negligently applied, or failed to apply, this brake in such manner as to suddenly check the car. It appears that it acted upon a principle the reverse of the ordinary brake, and that it was necessary to hold it off, or it would apply itself automatically and immediately stop the car unless held off. The sudden checking of the car, in consequence of Cox letting the brake loose, forced the lever down on plaintiff's knee, and drove the leg bone down into the ankle, permanently injuring the plaintiff. He fell from the car, and it was at once stopped, and Cox went back to where he was lying, and, according to the proof of two witnesses (though contradicted by Cox himself), stated that he did not go to do it, that his coat was about to get caught in the wheel, and he reached back for it with his left hand, and that threw him around so that the brake handle came out from under his right ³⁸³ arm, and the brake went on. This is the statement to which

objection was made. There is nothing in it prejudicial to the defendant in this case upon its theory.

It is insisted that Cox, in operating this brake, was a fellow-servant with Gann and the other hands, not filling the place of the master, but, for the time being, in the work and doing the service of a servant.

The court charged the jury, in substance, that under the facts as thus stated Cox and Gann were not fellow-servants, and the defendant would be liable for Cox's negligence. He was requested to charge, in substance, the reverse of this proposition, and declined.

It has been held in this state that a section boss and his subordinates occupy the relation of master and servant as to each other. It is evident, however, that a man may occupy the position of a master or vice-principal in some respects and in the doing of some acts, and that of a fellow-servant in other respects and in doing other acts. If a superior undertakes to do the work of a fellow-servant, and puts himself in the place to do the work of a fellow-servant, he becomes one as to that particular work, and his negligence in such case is that of a fellow-servant, and not that of a vice-principal. An individual may act in a dual capacity, not, it is true, at the same moment and in the same act, but he may, while generally acting as vice-principal and ³⁸⁴ standing in the place of a master, lay aside that character and authority, and occupy, for the time being, the place and do the work of a fellow-servant, and while thus engaged in the particular act he is, in the eye of the law, a fellow-servant, and the principal is not responsible for his negligence.

This distinction is clearly pointed out in the case of *Railroad Co. v. Bolton*, 99 Tenn. 277, and cases there cited. See, also, *Allen v. Goodwin*, 92 Tenn. 385.

The distinction is plainly and forcibly stated in *Stockmeyer v. Reed*, 55 Fed. Rep. 259, as follows: "The question is not one of rank. If the superintendent was acting at the time in the capacity of a fellow-servant, and his negligence caused the injury, the master is not liable. Notwithstanding his superior power, such superintendent is still a servant, and, in respect to such acts and work as properly belongs to a servant to do, he is, while performing them, discharging the duties of a servant": See the same case on appeal, *Reed v. Stockmeyer*, 74 Fed. Rep. 186. The same distinction is held in *Arkansas: Railway Co. v. Torry*, 58 Ark. 217, and cases there cited. So, likewise, in *Indiana: Nall v.*

Louisville etc. R. R. Co., 129 Ind. 264; Taylor v. Evansville etc. R. R. Co., 121 Ind. 124, 16 Am. St. Rep. 372. New York, Pennsylvania, Michigan, and other states hold the same doctrine: Hankins v. New York etc. R. R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616; Ross v. Walker, 139 Pa. St. 42, 23 Am. St. Rep. 160; Harrison v. Detroit etc. R. R. Co., 79 Mich. 385 409, 19 Am. St. Rep. 180. And the same doctrine is held in North Dakota, Minnesota, Georgia, Oregon, Virginia, Vermont, Kansas, California, Massachusetts, West Virginia, Illinois, South Carolina, Rhode Island, and other states. The states of Ohio and Missouri may be said not to recognize the distinction clearly and fully. And Texas, under an act of the legislature of that state, defining the relation, seems to be undecided, if not antagonistic to the view: Texas etc. Ry. Co. v. Reed, 88 Tex. 439; Sweeney v. Gulf etc. Ry. Co., 84 Tex. 433, 31 Am. St. Rep. 71. See the subject elaborately discussed in volume 47 of the Central Law Journal, of August 12, 1898, page 130 et seq. See, also, Bailey's Personal Injuries, secs. 1834, 1972, 2154, 2176, 2535.

The court was asked to charge that if plaintiff was one of a gang of laborers at work on the defendant road, and if the gang was under Cox, as foreman, and if Cox had charge of the brake, and the injury was brought about through the negligence of Cox in letting the brake loose and suddenly stopping the car, or throwing it on and suddenly stopping the car, the negligence would be the personal negligence of Cox, as distinguished from his official negligence, and defendant would not be liable; that in order to charge the defendant, Cox must so far stand in the place of the master as to be charged in the particular matter with a duty toward the defendant, which, under the law, the master ³⁸⁶ owed to him, and his negligence in such case could not be such an obligation. This was refused, and was, we think, error. We think the case is almost identical with that of Railroad Co. v. Bolton, 99 Tenn. 276, and with that of Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346. See, also, Northern Pac. R. R. Co. v. Charless, 162 U. S. 359; Martin v. Atchison etc. R. R. Co., 166 U. S. 403.

There is a conflict in the evidence as to whether this brake was in good and safe condition, and this is material, because, even if Cox was doing the work of a fellow-servant in handling the brake, and for his negligence in so doing the company would not be liable, still, if he failed to provide safe and proper appliances, he would, in that matter, be doing the work of his prin-

cipal, and for his negligence in not providing safe appliances the company would be responsible, as was held in *Railroad Co. v. Northington*, 91 Tenn. 56.

The proof tends to show that the brake was somewhat worn, so that it did not work as it would if in perfect condition, and that, in consequence of this wearing, Cox was required to hold it off with his hands all the time, otherwise it would automatically close upon the wheels, and immediately stop the car. The court charged the jury that "if the brake was not the kind ordinarily used in the management of hand-cars, and was not reasonably safe, and the plaintiff knew its condition, and continued in the employment of defendant knowing just what this brake was—that it was defective and not reasonably safe—he could not recover."

387 The proof leaves no doubt but that Gann knew the condition of the brake, whether it was safe or defective, so that we cannot affirm the judgment upon the ground that the brake was defective, or was so found by the jury. If they did so find, they must also have found that plaintiff had full knowledge of its condition.

It is urged upon us that this view of the law is inconsistent with the holding of this court in *Railroad Co. v. Northington*, 91 Tenn. 56, et sequitur. We do not so regard it. In the *Northington* case the section boss was recognized as the superior, as he is in this case. His negligence in the *Northington* case was that of a vice-principal, and was official. In this case it was that of a fellow-servant, and was personal. In the *Northington* case the section boss caused the gang to push before them a truck or push-car, containing two dumpbeds or boxes, in moving from one place to another. Instead of furnishing these dumpbeds with proper appliances to fasten them together, and thus to make it safe to push them over the track, there was no way to fasten them. To remedy this omission, the foreman stood upon the boxes, with a foot in each, thus attempting to supply the place of proper fastenings and couplings, which it was his official duty to provide. In addition, he was directing the movements of the car, and saw that the dumpbox was slipping, but calculated that it would not strike the platform, and took the risk of its
388 doing so, without giving any warning to the crew. He was negligent, therefore, in not providing, in the first instance, safe and proper appliances, and, next, in requiring the car to be run on after he saw the risk and danger, and without notifying the

crew of such danger. There was no evidence in that case that the foreman was in the habit of thus substituting his feet for a coupling appliance to hold the cars together, or that the crew was aware of such practice, in which event they might be held to have assumed the risk if they did not object (as was charged in the present case). He was also negligent, while guiding and directing the movements of the car, in not stopping when he saw the danger, and in not notifying his crew of such danger, and in both these negligent acts he was clearly in the line of his official duty as vice-principal. But, in the case at bar, if the brake was defective, it had been so for some time, and the fact was well known to plaintiff. The section boss was giving no directions and was not controlling the movements of the crew, but was manipulating the brake personally, which was a servant's place, and the accident was due to the unintentional, negligent act of the foreman thus engaged, in allowing the brake to escape his control.

We are of opinion there is error in the judgment of the court below, and it is reversed and cause remanded for a new trial. Appellee will pay costs of appeal.

In *Electric Railway Co. v. Lawson*, 101 Tenn. 406, questions similar to those decided in the principal case were presented. The action was for the death of plaintiff's decedent, who was a section hand, which death resulted from an attempt on his part, in obedience to an order of the section foreman, to board a moving car, whereby he was thrown under the car and killed. The relation between the section foreman and decedent was in issue. The court held that there was no immediate order or sudden emergency shown such as would justify an attempt to obey an order of a superior in a hazardous matter. As to the remaining matters—the relation between the foreman and deceased, and the question of the negligence of the former—the court adhered to the rule established in Tennessee that a section boss or track foreman is a vice-principal. As to whether the foreman's negligence in failing to stop the car in his charge in order to allow deceased to get on, was personal or official, it was held to be official. It was his duty "to control the cars . . . and it was also his duty to order the men on and off the cars. What he did or omitted to do, therefore, if negligent, was the master's negligence. He was running by there without stopping before or after deceased caught the car, having given orders to board them while in motion. The jury had the right to find this was negligence and that it was official."

APPEAL.—HARMLESS ERROR in the admission of evidence is no ground for a reversal of the judgment: *Rockford Ry. Co. v. Blake*, 173 Ill. 354, 64 Am. St. Rep. 122. A judgment will not be reversed for the reception of improper evidence if the same result must have been reached had such evidence been excluded: *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384. Where evidence could not produce prejudice, there can be no reversal: *Empire Mill Co. v. Lovell*, 77 Iowa, 100, 14 Am. St. Rep. 272.

RAILROADS—SECTION FOREMAN—VICE-PRINCIPAL.—A railway section foreman, having power to control, employ, and discharge the men under him, is a vice-principal, and not a fellow-servant with them, and the railway company is liable for his negligent act in throwing back an open switch, whereby one of the men under his control is injured: *Sweeney v. Gulf etc. Ry. Co.*, 84 Tex. 433, 31 Am. St. Rep. 71; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66, 28 Am. St. Rep. 388, and note; *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85, and note. Contra, *Spancake v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 184, 33 Am. St. Rep. 821; *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621, and note; *Schroeder v. Flint etc. R. R. Co.*, 103 Mich. 213, 50 Am. St. Rep. 354.

RAILROADS—INJURIES TO SERVANTS—ASSUMPTION OF RISKS.—If a car belonging to a connecting carrier is equipped with double buffers, that fact is open, apparent, and obvious. An experienced brakeman who attempts to make a coupling with such car assumes the risks attendant thereon: *Chicago etc. R. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456; *Louisville etc. R. R. Co. v. Stutts*, 105 Ala. 368, 53 Am. St. Rep. 127. Mere knowledge of a railroad employé that an appliance owned by the company is defective, and that risk is incurred in its use, does not, as matter of law, defeat the employé's action when the danger is not such as to threaten immediate injury, or when it is reasonable to suppose that the appliance may be safely used by the exercise of care and caution: *Swadley v. Missouri Pac. Ry. Co.*, 118 Mo. 268, 40 Am. St. Rep. 366; *Soeder v. St. Louis etc. Ry. Co.*, 100 Mo. 673, 18 Am. St. Rep. 724.

WEEKS v. McNULTY.

[101 TENNESSEE, 495.]

INNKEEPERS—LIABILITY—GENERAL RULE.—The general rule of law governing the liability of an innkeeper is, that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through the innkeeper's negligence.

INNKEEPERS—NEGLIGENCE—INJURY TO GUEST BY FIRE.—No presumption of negligence on the part of an innkeeper arises where a guest loses his life in a fire originating in, and destroying the premises. To make the innkeeper liable in such a case it must be shown that his negligence was the proximate cause of the fire and the consequent injuries.

APPEAL—REFUSAL TO PERMIT ANSWER TO QUESTIONS.—The refusal of the trial court to permit answers to pertinent questions affords no cause for reversal, unless the record shows affirmatively that the answers would have been competent and material evidence.

INNKEEPERS—NEGLIGENCE IN FAILING TO PROVIDE FIRE-ESCAPES—MUNICIPAL ORDINANCE—EVIDENCE.—In an action against an innkeeper, based upon his negligence in failing to provide his premises with fire-escapes, as required by city ordinance, resulting in the death of plaintiff's decedent, it is not error to exclude the violated ordinance from evidence where no causal con-

nection between the violation of the ordinance and the injuries complained of is shown.

EVIDENCE—ADMISSIONS AGAINST INTEREST—TESTIMONY IN SIMILAR CASE.—Where, in the course of a trial in an action for negligence, plaintiff is permitted to read to the jury portions of cross-examination of the defendant, in a former trial involving identical questions, for the purpose of showing admissions by defendant against his interest, defendant should be allowed to read the entire examination in chief to the jury.

APPEAL—INSTRUCTIONS—FAILURE OF DEFENDANT TO TESTIFY.—It is not error in an action for negligence to instruct the jury that no prejudicial inference could be drawn against defendants from their failure to testify, where it does not appear that such defendants had facts peculiarly within their knowledge and not fully known to other witnesses.

Templeton & Cates, for the appellant.

Fowler, Mynatt & Fowler, and Washburn, Pickle & Turner, for the appellee.

⁴⁹⁶ McALISTER, J. Plaintiff brings this suit to recover damages for the death of her husband, Arthur E. Weeks, which is alleged to have been occasioned ⁴⁹⁷ by the negligence of the defendants. The grounds of liability alleged in the declaration are: 1. That the defendants, at the date aforesaid, were proprietors of Hotel Knox, a public inn in the city of Knoxville, and had negligently permitted said hotel to be in an unsafe and dangerous condition; and 2. That defendants had not employed a sufficient complement of servants for the protection of the hotel and guests; and 3. That the servants employed were incompetent, whereby said hotel was, on April 9, 1897, destroyed by fire, and plaintiff's intestate, Arthur E. Weeks, who was a guest therein, lost his life. The more specific grounds of negligence are stated in the second count of the declaration, viz: That defendants had failed to provide fire-escapes, as ordered by an ordinance of the city of Knoxville, or other reasonable means of escape from said building; that defendants failed to arouse deceased or give him proper warning of said fire, and that this failure was due to defendant's omission in not employing a responsible watchman. It is further alleged that the fire was caused, and said hotel destroyed, by the negligence of defendant in allowing the cellar of his storehouse, which was situated next door to said hotel, to be filled with inflammable material. Defendants pleaded not guilty. The case was tried by a special jury, to whom a large volume of testimony was submitted. The trial resulted in a verdict and judgment for defendants. Plaintiff appealed, and has assigned errors.

⁴⁹⁸ The facts necessary to be stated are that the defendant, Frank McNulty, was the owner and proprietor of a public inn in the city of Knoxville, known as Hotel Knox. Plaintiff's intestate, Arthur Weeks, was a traveling man, representing the Rochester Stamping Works and the Robinson Cutlery Company, of Rochester, New York. On the evening of April 7, 1897, said Weeks reached the city of Knoxville, registered at the Hotel Knox, and was assigned to room 49, on the third floor. About 3 o'clock in the morning following Hotel Knox was destroyed by fire, and said Weeks perished in the flames. The fire was first discovered by the night watchman of the hotel, who immediately gave the alarm, ascended the stairway leading to the second and third floors, knocked upon the doors, and made every effort to arouse the guests. It is in proof that the guests were all aroused and escaped, excepting deceased and one other. It is in evidence that one of the guests, as he passed out, heard some one in room 49 pounding at the door, and noticed that he had kicked out one of the panels. If this evidence is to be credited, it tends to show that deceased heard the alarm, but had, unfortunately, fastened himself in, or, in the excitement, had lost all command of his faculties. It is also shown that parties occupying rooms on the same floor with deceased, immediately contiguous, and across the hall in opposite and diagonal directions, all received the alarm and succeeded in making ⁴⁹⁹ their escape. The building was provided with a front and rear stairway, but had no fire escapes. South of the Hotel Knox, and immediately adjoining, was the banking house of the Third National Bank, which being only one story in height, several of the guests leaped upon its roof from the burning hotel building. This mode of escape was accessible to deceased, since his window overlooked the roof; but it is not shown he had knowledge of it.

The general rule of law governing the liability of an innkeeper is, that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through the innkeeper's negligence: 11 Am. & Eng. Ency. of Law, 32.

"There is no natural presumption," said this court, "that a fire, the origin of which is unknown, was the result of the want of care of the owner or occupant of the premises. The ancient rule of the common law, which presumed negligence in such cases, was pronounced in the reported cases to be harsh and un-

reasonable, and was by the statute, 6 Anne, chapter 31, abrogated. The courts of this country, whether regarding the statute of Anne as in force or not, have unanimously held that negligence or misconduct was the gist of the action against one upon whose premises a fire had originated, and that such negligence would not be presumed from mere proof of the loss by fire communicated ⁵⁰⁰ from the premises of another": *Railway Co. v. Manchester Mills*, 88 Tenn. 659. It must be shown that the negligence of the innkeeper in this case was the proximate cause of the fire and the consequent injuries: *Deming v. Merchants' Cotton Press Co.*, 90 Tenn. 353; *Railroad Co. v. Kelly*, 91 Tenn. 699, 30 Am. St. Rep. 902; *Postal Tel. Co. v. Zopf*, 93 Tenn. 374.

We understand these principles were substantially charged by the circuit judge, and the issues of fact have been resolved by the jury in favor of the defendants. We find material evidence in the record to sustain these findings, and, under the rule, the verdict cannot be disturbed on this assignment.

The third assignment is, that the court erred in excluding testimony showing that defendant, McNulty, had stored in the rear of the grocery store, on the ground floor and near the elevator shaft, oils and other combustible materials. Counsel is in error in his statement of the action of the court. The grocery store, it appears, adjoins the hotel, and is situated just north of it. It was owned by McNulty, the proprietor of Hotel Knox. The object of this inquiry was to show that defendant had been guilty of negligence in storing oils and other inflammable substances on the ground floor of the grocery store, near the elevator shaft. This testimony was excepted to by defendant, on the ground that no such negligence was alleged in the declaration. The negligence alleged was that defendants had permitted the hotel to be in an unsafe and dangerous ⁵⁰¹ condition, and that they had filled the cellar with inflammable materials, but there was no allegation of negligence in storing oils and other combustible materials in the grocery store, on the floor above the basement. Moreover, it seems defendant was permitted to prove that coal oil was kept in the grocery store, but, when the question was asked, how near the coal oil was kept to the elevator shaft, an objection was interposed by defendants' counsel, which was sustained by the court. If it be conceded that the action of the court in sustaining the objection was erroneous, it is not shown in the bill of exceptions what the witness would have answered. It has been frequently held by this court that the re-

fusal of the trial court to permit answers to pertinent questions affords no cause for reversal, unless the record shows affirmatively that the answers would have been competent and material evidence: *Telegraph Co. v. Barnes*, 95 Tenn. 271; *Holmark v. Molin*, 5 Cold. 484; *State v. Turner*, 6 Baxt. 203.

The fourth assignment is, that the court erred in excluding the ordinance of the city of Knoxville, requiring the owners and keepers of hotels to erect fire-escapes thereon. The objection offered to this testimony was that the ordinance in question contemplated that notice to erect fire escapes must be given to the owner of the property by the board of public works, and that no such notice was given to the owner and proprietor of Hotel Knox. The declaration, as already observed, alleged that defendant ⁵⁰² had failed to provide fire-escapes for Hotel Knox, as ordered by an ordinance of the city of Knoxville. The insistence of counsel for defendant is that this ordinance contains no absolute requirement for the construction of fire-escapes, but only provides that the same may be required by the board of public works, if, in their judgment, they are deemed necessary. It is further insisted that, under the ordinance, the supervision, control, and direction of everything pertaining to fire escapes, including the number, locality, strength, capacity, and mode of structure, is committed to the board of public works, and that no plans or directions were ever furnished defendants by said board. It is insisted, however, that failure to comply with even an absolute requirement of a municipal ordinance in the erection of fire-escapes will not render the delinquent party liable to a civil action for damages resulting from such neglect, especially where the ordinance provides a penalty, and does not provide in its face for the civil liability. It is conceded that a civil action will lie for an act done in violation of a prohibitory state law (*Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935), but it is insisted a different rule prevails when the act is done in violation of a city ordinance. This precise question was left open and undecided by this court in *Schmalzried v. White*, 97 Tenn. 45.

It was held in *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698, where a statute or municipal ordinance ⁵⁰³ imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose benefit or protection it was imposed for any injuries of the character which the statute or ordinance was de-

signed to prevent, and which were proximately produced by such neglect.

In *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, it was held that where a city ordinance, in pursuance of the charter, makes it unlawful to leave a team standing unfastened or unguarded in a street, anyone injured by a violation thereof may maintain an action against the wrongdoer.

In *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354, it appeared that defendant had suspended a sign over a street in Boston, in violation of a public ordinance of the city. During an extraordinary gale, the sign was blown down, and a bolt, part of the fastenings, was hurled against plaintiff's window, causing damage, for which action was brought. Held that defendant was liable, notwithstanding due care was exercised in constructing and fastening the sign. The reason was, that the defendant had placed and kept the sign there illegally, and this illegal act contributed to plaintiff's injury.

In *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228, the action was to recover damages for personal injuries alleged to have been sustained by the plaintiff, a boy eight or nine years old, who ⁵⁰⁴ lost his arm by being run over by one of the defendant's cars. The particular negligence charged in the declaration was the omission of the railroad company to build a fence on the west line of its right of way, as required by an ordinance of the city of Chicago. The court held that an ordinance passed in pursuance of legislative authority has the force of law within the limits of the city, and, although in case of injury to persons by reason of the failure of the company to erect such fence, such default is not conclusive of liability, irrespective of contributory negligence by plaintiff, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. "The duty," says Mr. Justice Matthews, "is due, not to the city as a municipal body, but to the public, considered as comprised of individual persons, and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." "The nature of the duty," said Justice Cooley, in *Taylor v. Lake Shore etc. Ry. Co.*, 45 Mich. 74, 40 Am. Rep. 457, "and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit."

We are aware there is a line of cases which hold that when the duties enjoined by ordinance are due to the municipality, or to the public at large, and ⁵⁰⁵ not as composed of individuals, the rule is different, and an action will not lie for a breach of the ordinance. In many cases of the latter class it was held that the owners of land abutting on streets were liable to the city alone for the breach of ordinances requiring such owners to keep sidewalks clear of snow and ice, and in good repair, and that they were not liable in damages to persons injured by their neglect to perform the duties enjoined by such ordinances. These cases, it is said, proceed upon the ground that it is the sole duty of the city to keep the streets in good repair and clear of snow and ice: See *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Vandyke v. Cincinnati*, 1 Disn. 532; *Philadelphia etc. R. R. Co. v. Ervin*, 89 Pa. St. 71, 33 Am. Rep. 726.

An ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as any statute or other law of the state, and all persons interested are bound to take notice of its existence: *Bott v. Pratt*, 33 Minn. 328, 53 Am. Rep. 51; *Heland v. Lowell*, 3 Allen, 407, 81 Am. Dec. 670; *Vandine's Case*, 6 Pick. 187, 17 Am. Dec. 351; *Gilmore v. Holt*, 4 Pick. 257; *Johnson v. Simonton*, 43 Cal. 242-249.

The duty to erect fire-escapes required by this ordinance is not due simply to the municipality, or public at large, but was a regulation designed for ⁵⁰⁶ the peculiar benefit and protection of individuals. It is well settled that when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms: *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 463, 49 Am. St. Rep. 935; *Pauley v. Steam Gauge etc. Co.*, 131 N. Y. 90; *Willy v. Mulledy*, 78 N. Y. 314, 34 Am. Rep. 536.

We do not, however, decide the effect of the breach of an ordinance in fixing civil liability, nor do we adjudicate the proper construction of the ordinance offered in evidence, since neither question is necessarily involved in this case, for the following reason, namely: There is no proof in the record even tending to show that the deceased lost his life in consequence of the failure to construct fire-escapes, as provided by the city ordinance. The principle is recognized in all the cases that a liability cannot be predicated alone upon the breach of an ordinance, but it

must affirmatively appear that the injury sustained resulted proximately from said breach.

In *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, we said: "So, we think, the employment of the minor, in violation of the provisions of the statute in question, was an act of negligence on the part of defendant, and a causal connection between the employment and the injuries sustained by the boy being shown, there is liability. . . . The breach of the statute is actionable negligence, whenever it is shown ⁵⁰⁷ that the injuries were sustained in consequence of the employment. In other words, it is not enough that negligence exists, or that the ordinance was violated, unless it proximately caused the injury: *Deming v. Cotton Press Co.*, 90 Tenn. 353; *Railroad Co. v. Kelly*, 91 Tenn. 699, 30 Am. St. Rep. 902; *Postal Tel. Co. v. Zoppi*, 93 Tenn. 374.

After a very attentive reading of the record in this cause, we have failed to discover any causal connection between the death of plaintiff's intestate and the failure of defendant in error to erect fire-escapes, as required by the ordinance. It is not shown that deceased was at a window or in any position where a fire-escape would have afforded him any benefit whatever.

There is evidence tending to show that deceased had locked himself in his room and was heard beating on his door, trying to make his escape. It is shown that one of the windows of his room overlooked the Third National Bank building, and that deceased could, with entire safety to himself, have escaped by leaping to the roof of that building, as many others similarly situated successfully did escape. As already stated, it is not shown that deceased knew of this avenue of escape, and we cannot perceive how he would have been benefited by fire-escapes, under the circumstances surrounding him. We are, therefore, of opinion that, if the contention of counsel for plaintiff in error in respect of the proper construction of this ordinance were correct, and that ⁵⁰⁸ its breach would constitute actionable negligence, these questions are mere abstractions in this case, since no causal connection between the violation of the ordinance and the injuries sustained by the plaintiff is shown.

The fifth assignment is, that the court erred in permitting defendants to read as evidence the stenographer's report of the examination in chief of defendant, John R. Northington, given on the trial of the case of H. L. Crowder against these defendants in the circuit court of Knox county. It appears that the

case of Crowder against these defendants had been tried only a few days prior to this case, and on that trial John R. Northington was examined as a witness. The questions at issue in the Crowder case were identical with those involved in the present case. The plaintiff's counsel in the present trial read a large portion of Northington's cross-examination given on the former trial, for the purpose of showing admissions by Northington against his interest. Counsel for defendants then insisted the statements of Northington could not be well understood unless the whole of it was read, and thereupon offered to read the remainder of his evidence. The court ruled that defendant's counsel had the right to introduce the whole of the statement where any part of it is offered by the other side, and thereupon defendant read the whole of Northington's examination in chief, and plaintiff read the whole cross-examination, including the portion ⁵⁰⁰ her counsel had previously read. We think, after reading the testimony of Northington, that the cross-examination read by plaintiff's counsel could not be fully understood without reading the examination in chief. Says Mr. Wood, in his work on Practice and Evidence, section 160: "An important rule relating to the admissions of a party is that the whole statement containing the admission must be taken together, whether the admission is verbal or written; for, although some part of it may contain matter favorable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be proven, yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained." Of course, it is not admissible, under this rule, to read matters wholly disconnected and apart from the matter which constitutes the admission, but the whole admission, and anything bearing upon it and explanatory of it, is competent and relevant. Moreover, it is a conclusive answer to this assignment that plaintiff in error did not stand on the exception made, but read the whole of the cross-examination.

The seventh assignment is, that the court erred in charging the jury that no prejudicial inference could be drawn against defendants in this case from the mere fact that they did not offer themselves as witnesses and testify in this case. The general rule undoubtedly is, that the failure of a party to be ⁵¹⁰ examined, as to matters necessarily within his personal knowledge, affords a presumption against him, where the proof is not

clear, and the case he seeks to make could be proven by him if true: *Dunlap v. Haynes*, 4 Heisk. 476.

It is shown by witness, Hacker, that defendant, McNulty, was examined at the coroner's inquest, and stated that he did not get to the hotel until after the fire, and, hence, knew nothing about the matter. It is not shown there were any facts connected with the case peculiarly within his knowledge, and which were not known so fully to any other witness. The condition of the premises, including the elevator shaft, as well as the character and habits of John Davis, the colored night watchman, were fully proved by other witnesses. In respect of M. L. Ross' testimony, this witness was introduced by plaintiff, and does not state anything calling for a denial from defendant.

Numerous assignments are made, all of which have been carefully considered, but we find in them no reversible error.

Affirmed.

INNKEEPERS—LIABILITY.—An innkeeper is bound to see that one who enters his inn is protected, not only from the assaults or insults of those in his employ, but of the drunken and vicious men whom he may choose to harbor: *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732, and note discussing the question. If a guest is beaten in an inn, the innkeeper shall not answer for it: monographic note to *Clute v. Wiggins*, 7 Am. Dec. 452. Liability of innkeeper where guest contracts disease: *Gilbert v. Hoffman*, 66 Iowa, 205, 55 Am. Rep. 263; *Sheffer v. Willoughby*, 163 Ill. 518, 54 Am. St. Rep. 483.

EVIDENCE—ADMISSIONS AT A PREVIOUS TRIAL.—An admission made at the first trial, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case: *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40. The rule as applied to notes of testimony taken by counsel on a former trial: *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300, 86 Am. Dec. 544. As applied to minutes of testimony taken by the judge, see *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681.

INSTRUCTIONS—DEFENDANT NOT TAKING WITNESS STAND.—In a criminal case, it is proper to instruct a jury that unfavorable inferences are not to be predicated upon the fact that the defendant did not take the witness stand: *People v. Seamen*, 107 Mich. 348, 61 Am. St. Rep. 326.

AUSTIN v. STATE.

[101 TENNESSEE, 563.]

EVIDENCE—JUDICIAL NOTICE—DELETERIOUS NATURE OF CIGARETTES.—A court may take judicial notice that cigarettes possess no virtue, are inherently bad, and wholly noxious and deleterious to health.

INTERSTATE COMMERCE—REGULATION BY STATES—CIGARETTES.—Cigarettes are not legitimate articles of commerce, and, in the absence of congressional regulation to the contrary, a state statute may prohibit the importation and sale of cigarettes within the state. Such a statute is not in contravention of that clause of the federal constitution which inhibits state regulation of interstate commerce.

POLICE POWER—REGULATION BY STATES OF INTERSTATE COMMERCE.—Every state has the right under its reserved police power to prohibit the importation and sale of all articles inherently unworthy of commerce and unfit for the use of its people, and, in the absence of congressional action to the contrary, the determination by a state legislature that an article of doubtful commercial quality is not a legitimate article of commerce, is conclusive.

INTERSTATE COMMERCE—STATE REGULATION—SILENCE OF CONGRESS.—The rule that the silence of congress in relation to articles confessedly suited for commerce is to be taken as legally equivalent to its declaration that the transportation of those articles into the states shall be free and unrestricted, has no application to articles of doubtful commercial quality.

STATUTES—PRESUMPTION OF CONSTITUTIONALITY.—All intendments are in favor of the constitutionality of every statute passed with requisite form and ceremony.

INTERSTATE COMMERCE—STATE REGULATION—CONSTITUTIONALITY—BURDEN OF PROOF.—The burden is upon a person who assails a state's restrictive or prohibitory statute as an unwarranted interference with interstate commerce, to show that the particular article involved is a legitimate subject of commerce.

INTERSTATE COMMERCE—LEGITIMATE COMMODITIES—CONGRESSIONAL TAXATION OF CIGARETTES.—Congress, by imposing a revenue tax upon cigarettes, does not recognize them as proper commercial commodities.

INTERSTATE COMMERCE—ORIGINAL PACKAGE—DEFINITION.—An original package, as applied to interstate or international commerce, is a package, bundle, or aggregation of goods, put up in whatever form, covering, or receptacle for transportation, and as a unit transported from one state or nation to another.

INTERSTATE COMMERCE—ORIGINAL PACKAGE—BASKET CONTAINING CIGARETTE PACKAGES.—Where a number of packages of cigarettes containing ten cigarettes each are shipped from one state to another in a basket, the basket is an original package within the interstate commerce act. The presence or absence of covering to the basket is immaterial to the question whether or not the basket is an original package, and it is of no importance that the basket is owned by the transporting carrier.

POLICE POWER—MANUFACTURE AND SALE OF CIGARETTES.—A state statute prohibiting the sale of cigarettes manufactured within the state, is valid as an internal police regulation.

Welker & Parker, for the appellant.

Attorney General Pickle, for the appellee.

⁵⁶⁴ CALDWELL, J. W. B. Austin prosecutes this appeal in error from the judgment of the circuit court of Monroe county, whereby he was sentenced to pay a fine of fifty dollars and costs of suit, for unlawfully selling cigarettes. He admits the sale, but denies that it was unlawful.

⁵⁶⁵ Austin, who was a citizen and merchant of Monroe county, Tennessee, purchased from the American Tobacco Company, a New Jersey corporation, at its factory in Durham, North Carolina, a lot of cigarettes, in packages of ten cigarettes each, which it shipped thence, by express, to him at his place of business in this state; and there he sold one of these packages, without breaking, to W. G. Brown, an adult citizen of the same county.

The statute under which the conviction was had unconditionally prohibits all sales of cigarettes, whether manufactured in this state or elsewhere. It provides "that it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell, or to bring into the state for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor, punishable by a fine of not less than fifty dollars": Acts 1897, c. 30, sec. 1.

Austin concedes that his sale to Brown was clearly within the prohibition of this act, yet he says it was lawful, nevertheless. The substance of his contention is, that his sale was of an imported commercial article, in the original package, and that the statutory prohibition, as applied to such a sale, is obnoxious to the commerce clause of the federal constitution, and, therefore, null and void.

In considering this contention, we raise two vital inquiries: Whether or not cigarettes are legitimate ⁵⁶⁶ articles of commerce, and whether or not the sale shown in this case was of an original package in the true commercial sense.

1. Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful; never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether.

Beyond question, their every tendency is toward the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which, by human observation and experience, have become well and generally known to be true: *Schollenberger v. Pennsylvania*, 171 U. S. 1; 1 *Greenleaf on Evidence*, sec. 6; 1 *Wharton on Evidence*, sec. 282; 1 *Jones on Evidence*, secs. 129, 134; *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658, and note 693; *State v. Goyette*, 11 R. I. 592; *Watson v. State*, 55 Ala. 158; nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them: *Boullemet v. State*, 28 Ala. 83, 12 Am. & Eng. Ency. of Law, 199.

It is a part of the history of the organization of ⁵⁶⁷ the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that, among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and, perhaps, every other reason. It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea, and alone for the protection of the people of the state from an unmitigated evil. Such being the nature of cigarettes, they cannot be legitimate articles of commerce, and, consequently, are not within the provision of the federal constitution (U. S. Const., art. 1, sec. 8, cl. 3) in relation to the regulation by Congress of commerce with foreign nations, and among the several states, and with the Indian tribes. Only those things which are in fact commodities in some true sense, and, as such, are proper things for importation and use, can be legitimate articles of commerce and within the scope of the constitutional provision invoked by the defendant in this case. Regulation of traffic in things not suited for commerce was not by that provision delegated to Congress. Every state has the right, under its reserved police power, to prohibit the importation ⁵⁶⁸ and sale of all articles inherently unworthy of

commerce and unfit for the use of its people. Indeed, an active duty rests upon the legislative branch of the state government to enact appropriate laws for the protection of the public against the hurtful influence of such articles, and, in the discharge of that important duty, the members of the legislature must be allowed to act in accordance with the dictates of their own best judgment. This does not mean, however, that the state legislature may override congressional legislation on the subject, or that the state has the paramount right to determine what is and what is not a legitimate article of interstate or international commerce. The reverse is true. Congress has the superior right in the determination of that question, and its decision, when made, is controlling. But, if the question arises in the state in advance of congressional action, as in the present instance, the state legislature may and should act according to its own deliberate view of the matter, and its action, when taken, is and should be conclusive until Congress shall have given some adverse expression on the same subject. We are mindful of the rule that the silence of Congress in relation to articles confessedly suited for commerce is to be taken as legally equivalent to its declaration that the transportation of those articles into the states shall be free and unrestricted: *Mobile v. Kimball*, 102 U. S. 691; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 492; *Leisy v. Hardin*, 135 U. S. 100; *State v. Scott*, 98 ⁵⁶⁹ Tenn. 260; but congressional nonaction upon the antecedent question as to whether or not other articles are suited for commerce, is not tantamount to an affirmation by that body that they are so. Articles of the former class are already within the domain of congressional regulation, while those of the latter class are as yet beyond that domain and within the control of the states, and, from the nature of the case, must remain so, unless and until affirmatively determined by higher authority to be worthy of commerce, and thereby transferred to the other class. The right of a state to protect its people, in their comfort, health, and safety, against the importation and sale of noncommercial articles has long been recognized, and never questioned, by the supreme court of the United States: *License Cases*, 5 How. 504; *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465; *Hannibal etc. R. R. Co. v. Husen*, 95 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Plumley v. Massachusetts*, 155 U. S. 461; *Collins v. New Hampshire*, 171 U. S. 30; *Schollenberger v. Pennsylvania*, 171 U. S. 1.

In the license cases Mr. Justice Catron observed that what belongs to commerce is within the jurisdiction of the United States, and that what does not belong to commerce is within the jurisdiction of the state, and by the state may be excluded from introduction: *License Cases*, 5 How. 600.

The statute of Pennsylvania impeached in *Schollenberger v. Pennsylvania*, 171 U. S. 1, was adjudged violation ⁵⁷⁰ of the commerce clause of the federal constitution, because it prohibited the importation and sale of pure oleomargarine. In the course of his opinion in that case, Mr. Justice Peckham attached controlling importance to the fact that pure oleomargarine, as contradistinguished from that which was adulterated, was a wholesome article of food, and had been recognized by Congress as a commodity suitable for commerce; and, in recognition of the state's right to exclude the adulterated article, said: "The bad article may be prohibited, but not the pure and healthy one."

In *Plumley v. Massachusetts*, 155 U. S. 467, it was said, in effect, by the court, speaking through Mr. Justice Harlan, that deceptive discoloration or adulteration of imported oleomargarine removed it from the domain of congressional regulation, and subjected it to unconditional exclusion by state law.

The New Hampshire enactment involved in *Collins v. New Hampshire*, 171 U. S. 30, provided for the exclusion of all oleomargarine not of a pink color. It was held to be invalid, for the reason that it virtually excluded pure oleomargarine, which was never naturally pink in color, and which was a proper and well-recognized commercial commodity.

The case of *Leisy v. Hardin*, 135 U. S. 100, is the one most urged upon our attention by counsel for Austin. That case, however, like all the others, recognized the right of the state, under its police power, to prevent the introduction of noncommercial ⁵⁷¹ articles among its people. Mr. Chief Justice Fuller distinctly places the court's decision upon the ground that the commodities whose importation and sale were so greatly restricted by the Iowa statute there examined, had been "recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts" as proper articles of commerce, and were, therefore, subject, in the first instance, to congressional regulation only. In the conclusion of the opinion he said: "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot

hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulation, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

That case, then, as the others that declare state restrictions and prohibitions unauthorized and invalid, is distinguishable from the present one in the fundamental and ever-controlling fact that the articles there in question were commercial commodities in some true sense, and as such appropriately recognized, while those here in question are not so. Moreover, besides the conclusive recognition received by those articles, they stand upon a higher plane in respect of inherent merit than cigarettes, for they are confessedly ⁵⁷² beneficial in some instances and for some purposes, while cigarettes have no redeeming qualities. The Iowa statute, upon its face, distinctly acknowledged that the restricted articles possessed some virtue, by allowing importations and sales of them for certain purposes and under certain restrictions. In no instance has a state's right of authority and control been denied when the commodity restricted or prohibited was not first found to be a proper subject of commerce, and therefore within the jurisdiction of Congress and beyond the jurisdiction of the state. The existence of that fundamental fact has always been the decisive criterion, and the burden of showing it is upon the complaining party.

All intendments are in favor of the constitutionality of every statute passed with requisite form and ceremony: Cooley's Constitutional Limitations, 5th ed., 218; Black's Constitutional Law, sec. 28; Sutherland on Statutory Construction, sec. 332; Railroad Co. v. Harris, 99 Tenn. 703; hence, the burden is upon the person who assails a state's restrictive or prohibitory statute, so passed, as an unwarranted interference with interstate or international commerce, to show that the particular article involved is a legitimate subject of commerce. If that fact be not made to appear in some appropriate way, his assailment must be unsuccessful.

Mr. Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 436, wherein a state statute was challenged for repugnance to the commerce clause of the federal constitution, remarked: "It ⁵⁷³ has been truly said that the presumption is in favor of every

legislative act, and that the whole burden of proof lies on him who denies its constitutionality."

The same rule was announced and emphasized by Mr. Chief Justice Waite in this language: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule": *Sinking Fund Cases*, 99 U. S. 718.

If there were only a doubt, then, that cigarettes are legitimate articles of commerce, that doubt would be resolved against the defendant and this act would be sustained. But, as already stated, they are clearly not so, as the court may judicially know (*Schollenberger v. Pennsylvania*, 171 U. S. 1), and the passage of the act is a legislative determination to that effect, which must be treated as conclusive of the question, in the absence of congressional expression to the contrary. Congress has laid a tax on cigarettes, prescribing the forms in which they may be put up and the manner in which they shall be stamped: U. S. Rev. Stats., sec. 3392. This was done, however, for purposes of revenue only, and, without more, was not a recognition of them as legitimate articles of commerce.⁵⁷⁴ It was no expression on the subject of commerce one way or the other. Indeed, all internal revenue legislation is referable to a different provision of the fundamental law (U. S. Const., art. 1, sec. 8, cl. 1), and should be construed as relating to questions of revenue only, unless obviously intended to include some additional subject, which is not true in this instance. The fact that Congress has declared by general statute (U. S. Rev. Stats., sec. 3243) that the payment of any tax imposed by the internal revenue laws for the carrying on of any trade or business shall not authorize the pursuit of that trade or business in any state forbidding the same, nor prohibit state taxation thereon, indicates unmistakably that Congress does not intend by the imposition of such special tax to reach, determine, or in any way affect questions appertaining to interstate or international commerce. The imposition of the tax is aside from all these questions. The statement herein that the taxation of cigarettes is not a recognition of them as proper commercial commodities, is sustained by the reasoning and decision in the case of *Plumley v. Pennsylvania*, 155 U. S. 461.

2. Was the sale shown to have been made in this case a sale of an original package, in the true commercial sense? We think not. It may be truly said to have been an original package for the purposes of taxation, because put up by the manufacturer, in the first instance, in one of the forms ⁵⁷⁵ prescribed by the internal revenue statute (U. S. Rev. Stats., sec. 3392); yet it was not an original commercial package, because not sold and transported apart from other like articles, but in the same general receptacle with them. Speaking generally, we would say that an original package, as applied to interstate and international commerce, is a package, bundle, or aggregation of goods, put up, in whatever form, covering, or receptacle, for transportation and as a unit transported from one state or nation to another.

In *Guckheimer v. Sellers*, 81 Fed. Rep. 997, the court said: "An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package; but, if a number are fastened together and marked, or are packed in a box, barrel, crate, or other receptacle, such bundle, box, barrel, crate, or other receptacle constitutes the original package."

The supreme court of Iowa considered this question in *McGregor v. Cone*, 104 Iowa, 465, 65 Am. St. Rep. 522; and, upon the authority of numerous cited cases, ruled, as correctly stated in the headnote, as follows: "1. An original package is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped; 2. The determination of the ⁵⁷⁶ internal revenue department that a package is a proper and original package for purposes of taxation, does not show that it is an original package of commerce; 3. A pine box, in which are packed for commercial shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with an internal revenue stamp, without any other packing or inclosure around or about them except the box itself, is the original package of commerce; and, when that is opened, the packages of cigarettes are subject to the police power of the state, as a part of the common mass of property therein."

The material facts of the present case are, that the defendant purchased from the American Tobacco Company, at its fac-

tory in Durham, North Carolina, a lot of cigarettes, manufactured by that company at that factory, and there, by it, put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that, after defendant's purchase, the American Tobacco Company piled upon the floor of its warehouse in Durham, North Carolina, the number of boxes or packages sold, and, having done so, notified the Southern Express Company to come and get them; and said company, by its agent, took them from the floor and placed them in an open basket, already and previously in the possession of the Southern Express Company, and, in that basket, had them transported by express to the defendant's ⁵⁷⁷ town in Tennessee, and there an agent of the same express company took the basket to the defendant's place of business, and lifted from it, on to the counter of the defendant, the lot of detached boxes or packages of cigarettes, and thereupon took a receipt, and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages, without breaking it, and for that sale he stands convicted.

Under these facts, it is entirely manifest to our minds that the basket, with its contents, made one original package in the true commercial sense, each box or package of cigarettes being a constituent part thereof, and that the original commercial package was broken, and each box or package of cigarettes assumed a separate identity before the law when the basket was relieved of its contents. This is true, though the basket was open all the while, and was filled and emptied by the agent of the express company. A box, crate, barrel, or basket, filled with goods for shipment, and actually transported from a citizen of one state to a citizen of another state, it is no less a receptacle of the goods in a legal sense, and such receptacle is no less an original commercial package because open and not covered. The presence or absence of a covering to a receptacle so used is of no consequence in determining what is and what is not an original package.

In *South Dakota v. Chapman*, 1 S. Dak. 414, and also in *Rion v. Alabama*, 91 Ala. 2, it ⁵⁷⁸ appeared that whisky, in bottles separately wrapped, had been packed and shipped in uncovered boxes, furnished by the shippers, and the court held, in each case, that the open boxes, and not the separate bottles, were the original commercial packages. The ownership of the basket used in

the shipment involved in this case—whether in the shipper or the carrier—is not disclosed. If the defendant predicated anything of ownership in the carrier, the burden was upon him to show that ownership. To avail himself of the protection afforded by the federal law in relation to the sale of original packages, he must prove every fact essential to show that his sale was of such a package: *Keith v. Alabama*, 91 Ala. 2. But we regard the question of such ownership as wholly immaterial, for, in taking the basket to the factory of the shipper and there putting the cigarettes in it, the express company's agent was acting for the seller, and the legal effect of his action was the same as if the basket had been procured and filled by the shipper alone. It is perfectly obvious, moreover, that this plan of shipment was resorted to as a mere device for the purpose of evading the state law against the sale of cigarettes. Prior to the passage of this law, as is well known, no such scheme was adopted in the transportation of such articles, and the carrier was not called upon to play so unusual a part in such a matter.

Our conclusion upon the whole case is: 1. That ⁵⁷⁹ cigarettes are not legitimate articles of commerce, and, consequently, that their importation and sale are not within the scope of the commerce clause of the federal constitution, but are subject to state control and prohibition; and, 2. That if they were legitimate articles of commerce the sale for which the defendant stands convicted was not of an original commercial package, and hence was not protected by that clause of the federal constitution.

Since cigarettes are not legitimate articles of commerce and as such within the domain of congressional regulation, the statute here called in question is valid as a whole—that part which prohibits the importation and sale of cigarettes manufactured out of the state, as well as that part prohibiting the sale of those manufactured in the state—and the defendant's conviction is sustainable under the statute generally, or under the former part, without reference to the question of original package. But if they were legitimate articles of commerce, and the former part of the statute, therefore, invalid, the latter part would remain valid, nevertheless (*State v. Scott*, 98 Tenn. 254), as an internal police regulation (*Kidd v. Pearson*, 128 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623; *Plumley v. Massachusetts*, 155 U. S. 461); and the defendant's conviction would be sustainable thereunder, because his sale to Brown was not of an original commercial package, but only of a part thereof after it had been

broken and its contents thereby made subject to the laws ⁵⁸⁰ of the state, like other local property of the same class: *Leisy v. Hardin*, 135 U. S. 100; *Schollenberger v. Pennsylvania*, 171 U. S. 1.

We are aware that Judge Lurton, for whose opinion we have great respect, ruled otherwise in the case of *Sawrie v. State*, 82 Fed. Rep. 615, upon a record very similar to this one, yet we believe our conclusion entirely sound.

Affirm.

INTERSTATE COMMERCE—REGULATION BY STATE—LEGITIMATE COMMODITIES.—A state has no right to interfere with, or to attempt to regulate, interstate commerce in an article on the ground that it is deleterious to the inhabitants of the state, so long as it is recognized in the commercial world, by the laws of congress, and by the decisions of the courts as a commodity in which a right of traffic exists: *McGregor v. Cone*, 104 Iowa, 465, 65 Am. St. Rep. 522. The rule in the principal case that cigarettes are not legitimate articles of commerce is denied in *McGregor v. Cone*, 104 Iowa, 465, 65 Am. St. Rep. 522, where it was held that cigarettes are a recognized commercial commodity. Hence, a state statute which prohibits the sale of cigarettes within the state by all persons, except jobbers, who do an interstate business with customers outside of the state, is in contravention of section 8, article 1, of the federal constitution, conferring upon congress the exclusive right to regulate commerce among the several states, and is void, so far as it amounts to such a regulation: See, also, *State v. Goetze*, 43 W. Va. 495, 64 Am. St. Rep. 871.

INTERSTATE COMMERCE—ORIGINAL PACKAGES.—The rule stated in the principal case as to what constitutes an original package is sustained by *McGregor v. Cone*, 104 Iowa, 465, 65 Am. St. Rep. 522; *Haley v. State*, 42 Neb. 556, 47 Am. St. Rep. 718; *State v. Parsons*, 124 Mo. 436, 46 Am. St. Rep. 457, and note; monographic note to *People v. Wemple*, 27 Am. St. Rep. 553. But in *State v. Goetze*, 43 W. Va. 495, 64 Am. St. Rep. 871, it was held that if cigarettes are put up in paper boxes, at a factory for the manufacture of cigarettes, each box containing ten cigarettes, and are shipped, for sale, in a large wooden box, which, for convenience of shipment, contains a number of the smaller paper boxes, each paper box must be regarded as an original package, where it has a proper label, giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, et cetera.

STATUTES.—ALL PRESUMPTIONS ARE SOLVED IN favor of the constitutionality of a statute. It devolves upon one who assails it to point out certainly and clearly wherein it is unconstitutional: *Mauldin v. Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723.

GONCE v. McCoy.

[101 TENNESSEE, 587.]

EXECUTION—SALES—CAVEAT EMPTOR.—In execution and judicial sales of land, except in special cases, there is no warranty of title or quality, but the rule of caveat emptor applies, and the purchaser gets virtually nothing but the quit-claim title of the debtor defendant.

EXECUTION—SALES—JUDGMENT CREDITOR AS PURCHASER—DEFECT OF TITLE.—A judgment creditor who bids the amount of his judgment on land and thus satisfies it is not entitled to have the satisfaction vacated and the judgment reinstated because he only obtained a life estate in the land, when he believed he was getting a fee simple estate, and bought under that belief. If he obtains any beneficial interest by his purchase, he is not entitled to such relief.

ESTATES—ESTIMATE OF VALUE—LIFE ESTATE.—The value of a life estate should be estimated, not in the light of its actual duration as subsequently developed, or the rents received in that time, but at its value at the time of purchase, estimated according to the rules usually adopted in estimating the value of life estates.

Estill & Turney, J. T. Matthews and Banks & Embry, for the appellant.

Lynch & Lynch, for the appellee.

⁵⁸⁸ **WILKES, J.** This bill is filed to set aside the satisfaction of a judgment and have it restored to vitality and force, and to have the judgment thus restored declared a lien upon land and the land sold to satisfy the same. The chancellor dismissed the bill, refusing any relief, and the complainant appealed. The court of chancery appeals reversed the chancellor, and decreed that the satisfaction be set aside; that a lien be declared for the reinstated judgment; that it be collected out of certain lands and out of a certain judgment obtained by defendant, McCoy, against Sells, the vendor of the land to him. The case was also remanded for an account of rents received by complainants and for the execution of the decree. Both parties have appealed to this ⁵⁸⁹ court—the complainant from so much of the decree as holds him for rents, and the defendants from the remainder of the decree, setting aside the satisfaction and declaring a lien and decreeing a collection.

The facts found by the court of chancery appeals, so far as they need be stated, are that McCoy purchased from P. G. Sells a tract of land which belonged originally to one Rice, at the price of two thousand four hundred dollars, of which twelve

hundred dollars was paid in cash, and for the balance three notes were given, each for four hundred dollars. One of these notes was paid, and complainant bought the other two for six hundred and sixty-six dollars, and claims to be an innocent holder of them. They were secured by a lien on the land. The land, by proper proceeding was sold to satisfy the judgment obtained on these notes, amounting to one thousand and fifty dollars, and was bought by complainant, at his debt and costs, and the judgment was thus satisfied. It appears, however, that Rice, the original owner of the land, before he conveyed it to Sells, had made a conveyance of it to Nancy McCoy, reserving a life estate in himself. One of the conditions of the conveyance to Nancy McCoy was that she should live with Rice and family until his death. She failed to do this, but left the state, and Rice thereupon filed a bill to vacate the deed, alleging that it had never been delivered and had never taken effect. Such proceedings were had that this deed was set aside, and Rice thereupon sold to William Sells, and he to P. G. Sells, and he to A. J. McCoy, as before ⁵⁹⁰ stated. After the vendor's lien had been enforced by Gonce, the holder of the notes, against A. J. McCoy, and after the death of Rice, Nancy McCoy having also died, her heirs filed a petition setting up the original deed to their mother, and claiming the land under it, alleging that when Rice's proceedings were had against Nancy McCoy, to vacate her deed, she was dead, and the proceeding therefore a nullity. The result of this suit was that the heirs of Nancy McCoy recovered the land from Gonce, the purchaser and holder of the notes; and Gonce thus lost the benefit of his purchase, except as to the life estate of Rice. He had possession, however, of the land, under his purchase, from November 5, 1892, to May 5, 1893, the date when Rice died, and until that date his purchase was good in any event, as he held the life estate of Rice, and was entitled to hold it, even as against the heirs of Nancy McCoy. This bill was then filed by Gonce, the purchaser of the land and holder of the notes, to set aside the satisfaction of his judgment, on the ground that, by his purchase, he had not obtained a fee simple title to the land bought. We consider this question primarily, inasmuch as, if the judgment is not set aside, the question of its lien and enforcement need not be considered.

The court of chancery appeals find that when complainant bought the notes sued on he was assured by both McCoy, the maker, and Sells, the indorser, that the title to the land for

which they ⁵⁹¹ were given was good, and he believed he was getting a good title in fee simple to the land by his purchase. It appears that neither party had actual notice of the particular defect in title which caused the loss, and, hence, there was no fraud, though there is some evidence of a supposed defect arising from a different source known to both parties.

Gonce, as before stated, obtained by his purchase the life estate of Rice, but did not get the fee simple. He went into possession in November, 1892. Rice died in May, 1893. In this interval, Gonce had received the rents and profits of the land, and was required by the court of chancery appeals to account for the same as a credit upon his judgments when reinstated and as a condition to their reinstatement. Upon this feature of the case the question is narrowed down to this: Is the creditor, who has bid his judgments on land, and thus satisfied them, entitled to have this satisfaction vacated and the judgments reinstated because he only obtained a life estate in the land, when he believed he was getting a fee simple estate and bought under that belief? Unquestionably, if there be a total failure of title and the purchaser get nothing by his purchase, such a result would follow.

The provision of the code (Shannon's Comp. Stats., sec. 4719), is, in substance, that the satisfaction may be set aside by scire facias if no title is obtained to the property bought to satisfy the judgment.

But the question in this case is, Does such remedy, ⁵⁹² or a remedy in chancery, exist when the purchaser obtains a valid title to the property, but not the one which he understood he was getting—in other words, when the title acquired is good so far as it goes, but does not confer the quantum of estate which the purchaser expects under his purchase? It is well settled that in sales of land under decree and under execution, except in special cases, there is no warranty of title or quality, but the rule of caveat emptor applies, and the purchaser gets virtually nothing but the quitclaim title of the debtor defendant. In this case it appears that the complainant, as purchaser, was aware that the title to this land was questionable, and bought with this knowledge, but he did not know of the particular defect which afterward occasioned his loss, but his knowledge was of other supposed defects which were not real. He bought a property under these circumstances which originally cost two thousand four hundred dollars, and paid for it in notes which cost

him six hundred and sixty-six dollars, and while he had no notice, as stated, of the defect in title which finally caused the loss, he did know that the title was being questioned on other grounds, and bought at the risk of this and over the protest of the defendant, McCoy, who was trying to prevent an enforcement of the vendor's lien and a sale of the land by setting up a defective title. We think that the fact that the complainant, as purchaser, got only a life estate, when he expected to get a fee simple estate, cannot entitle him to have the satisfaction ⁵⁹³ of his judgments bid on the property set aside. It is true the life estate proved to be of short duration, and hence brought but little return to the purchaser. But this cannot matter. It might have continued for a long number of years and been almost as valuable as the fee, so there was neither entire failure of title nor of consideration. To hold that, because he thought or expected to get a fee, he is entitled to relief because he only got a life estate, would be proceeding upon the idea that the sale carries with it a warranty of title, not only as to validity of title, but as to quantum of estate.

He is not entitled to such relief if he obtains any "beneficial interest" by his purchase, and the courts cannot measure the benefit or value of the interest acquired if it is substantial: *Hayes v. Cartwright*, 6 Lea, 145. It should be stated that Gonce, the purchaser, does not offer to refund what he really obtained by his purchase, but he objects to refunding or accounting for anything he has received, and appeals from so much of the decree of the court of chancery appeals as requires him to give credit for the rents received; in other words, he insists he has a right to have his judgments restored and reinstated and still to hold on to all he has received from a sale under these judgments. In his bill he does not offer to return what he received, and while he acquired Rice's life estate under his purchase, he refuses to account for what he received ⁵⁹⁴ out of his purchase of it. This he cannot do: *Hill v. Harriman*, 95 Tenn. 305. But if complainant is entitled to have the satisfaction set aside at all, it would be more proper to do so on condition that he account for the value of the life estate he obtained and not merely the rents during the time he occupied it. And the value of that life estate would be estimated, not in the light of the actual duration of the life estate as subsequently developed or the rents received during that time, but at its value at the time of purchase, estimated according to the rules usually adopted in

estimating the value of life estates. To illustrate: If this life estate of Rice had continued for ten, twenty, or fifty years, and complainant had all the while been enjoying the use of the property under his purchase, it would hardly be insisted he would be entitled to have the satisfaction set aside on the ground that he had not obtained the fee. The value of the estate acquired by complainant at his purchase must be estimated at the date of the purchase and its probable value at that time, and not by its actual return as subsequently developed.

We are of opinion that the court of chancery appeals is in error in holding that the complainant is entitled to have the satisfaction of the judgment in this case set aside and the judgments restored to force and vitality, but that he is bound by his purchase and the benefits received thereunder, and it is not necessary to consider the other question.

595 The decree of the court of chancery appeals is reversed and the decree of the chancellor affirmed, and the bill is dismissed, and complainants will pay all costs in this court and the court below.

EXECUTION—SALES—CAVEAT EMPTOR—There is no warranty of title by a sheriff at an execution sale. The purchaser takes just what title the defendant in the execution has, and buys at his peril. The rule of caveat emptor applies to him: *Greer v. Winter-smith*, 85 Ky. 516, 7 Am. St. Rep. 613, and note. In sales of land under execution, the rule caveat emptor applies, and, on failure of title, the purchaser has no relief from the payment of his bid except by resort to equity: *Stearns v. Edson*, 63 Vt. 259, 25 Am. St. Rep. 758; *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40, and note. See the extended note to *McGhee v. Ellis*, 14 Am. Dec. 131, where the entire question is discussed. See, also, *Henderson v. Overton*, 2 Yerg. 394, 24 Am. Dec. 492.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

JONES v. STATE.

[88 TEXAS CRIMINAL REPORTS, 87.]

WITNESSES — COMPETENCY — WIFE IN CRIMINAL CASE.—A wife can be a witness for her husband, but not against him, and the state in a criminal case has the right to cross-examine her pertaining to the facts sworn to by her on direct examination. When the state leaves the matter elicited in the examination in chief, and attempts to prove independent material facts by her, it makes her its witness and a witness against her husband against his objection. This cannot be legitimately done. To permit it is reversible error.

WITNESSES — CROSS-EXAMINATION — MAKING ONE PARTY'S OWN WITNESS.—When the matter elicited from a witness in his examination in chief is departed from, or when the facts sought to be established on cross-examination are not pertinent or germane to those elicited in the examination in chief, the witness becomes the witness of the party attempting to prove such matter.

HOMICIDE—WIFE OF THE ACCUSED AS A WITNESS—EVIDENCE TO SUPPORT HER.—If the defense to murder is insulting words and conduct by the deceased toward the wife of the accused which she communicated to him, and to which she has testified, it is error to exclude the testimony of witnesses to establish the fact that, before the homicide, she had stated to them the facts as testified to by her. Such testimony is admissible to support her, and to show that her husband believed her statements and committed the homicide in consequence thereof, when the theory and evidence on behalf of the prosecution is to the effect that her testimony was prompted by an improper motive and was recently fabricated solely to aid in the defense of the husband.

MURDER—INSULTING CONDUCT TOWARD WIFE—EVIDENCE.—If the defense to murder is insulting conduct by the deceased toward the wife of the accused, he may prove, as original evidence, that prior to the homicide his wife communicated a statement of the insulting conduct toward her to the witness, who in turn communicated it to the husband.

HOMICIDE — MURDER — EVIDENCE OF REPUTATION OF DECEASED.—If the defense to murder is insulting conduct of the deceased toward the wife of the accused, which she has com-

municated to him, the bad general reputation of the deceased, as well as his general reputation as a man of unchaste and lecherous habits toward women, is admissible in evidence upon the issue as to whether the accused believed the information received from his wife and acted thereon.

HOMICIDE—EVIDENCE—STATEMENTS OF DECEASED—HEARSAY.—If the defense to murder is insulting conduct by the deceased toward the wife of the accused, the testimony of a witness, that, subsequently to the alleged insulting conduct, he saw a woman in the office of the deceased, and that the latter informed him that she was the wife of the accused, is hearsay and inadmissible.

HOMICIDE—WIFE AS WITNESS—CROSS-EXAMINATION.—If, upon the trial of a husband on a criminal charge, his wife as a witness, on direct examination, should swear to facts injurious to him, he cannot complain, but her cross-examination must be confined to the matter elicited upon the examination in chief. Everything which is legitimate for the purpose of testing her knowledge of the facts sworn to, her bias or prejudice, or any matter that legitimately goes to discredit her, is admissible on cross-examination, but if the prosecution leaves the matter testified to on the examination in chief and proposes to prove independent criminative facts against the accused, this is not cross-examination, and the wife then becomes a witness for the prosecution. Her examination must then stop, because she cannot become a witness against her husband.

HOMICIDE—EVIDENCE—RES GESTAE.—If the defense to murder is insulting conduct by the deceased toward the wife of the accused, and she has testified as to such conduct and to communicating it to her husband, and that he and deceased were friendly until she made such communication, the prosecution cannot prove by her, as part of the *res gestae*, on cross-examination, matters relating to the disposition of her property, deceased's connection therewith, or the squandering of her property by her husband.

WITNESSES—IMPEACHMENT.—If a witness is attacked by showing that he has testified corruptly, or has recently fabricated his testimony, he can be supported by proof that that he had at a prior time made the same statements, before any motive could have existed.

R. B. Seay, J. C. Muse, S. H. Russell, and Miller & Williams, for the appellant.

M. Trice, assistant attorney general, for the state.

vs DAVIDSON, J. Appellant was convicted of murder in the second degree and given twenty years in the penitentiary; hence this appeal.

The record contains something over three hundred pages of typewritten matter, a great deal of which is absolutely unnecessary to a proper understanding of the points in the case necessary to be reviewed by this court. We have repeatedly called attention to the fact that care should be taken by the lower courts in preparing a record for this court, so that the points in the case may be clearly presented, without unnecessary pro-

lixity or confusion. To make a record in the lower court containing a great deal of useless matter is an idle consumption of time, tending to produce confusion, requiring great labor in the preparation of such a record, and is a draft upon the time of this court in reading, analyzing, and dissecting the same so as to ascertain what essential matter the record contains. And we again call attention to this practice.

After a painstaking and exhaustive perusal of the voluminous record, it occurs to us that the only questions that require a discussion and reviewal by this court, necessary to a proper disposition of this case, are as follows: 1. The action of the court in permitting a cross-examination of Mrs. Jones upon matters, as insisted upon by appellant, not drawn out from her on the examination in chief, and not pertinent to such examination; 2. The action of the court in refusing to permit the appellant to prove by the witness Kendall what defendant and his wife may have told him with reference to the alleged insults of deceased toward her; 3. The general reputation of deceased with reference to his being a man of chaste and virtuous habits and conduct toward women, or otherwise; 4. The admission of the testimony of S. Q. Richardson, as to seeing a woman in the office of Veal during the year 1885, and that Veal told witness that it was Mrs. Jones, et cetera.

In order to a proper understanding of these questions, we will summarize the case sufficiently to show their bearing. The evidence on the part of the state tended to show an unprovoked murder. The killing occurred in the city of Dallas during the fall of 1892, while the Dallas Fair was in progress. On the morning of the homicide, Veal, the deceased, and several others, were in a room in the third story of the Gaston building on Commerce street, preparing some data or program in connection with the Confederate Reunion to take place at the Fair. Veal was busy at the time, writing. Defendant came upstairs, walked into the room, drew his pistol, placed it in close proximity to the head of deceased, and fired upon and killed him. The defense set up by appellant went merely to the degree of the homicide; that is, he claimed that he killed deceased because of the insulting words and conduct toward his wife, after their marriage, which was intensified by an alleged rape upon ⁹⁹ her by the deceased prior to their marriage; and that he killed deceased on their first meeting after being informed thereof. The defendant having been previously acquitted of murder in the first

degree, the only issue presented on this trial was whether or not he was guilty of murder in the second degree or of manslaughter.

1. Appellant introduced his wife as a witness, who testified as to the alleged rape, which she testified was committed upon her in the year 1871, prior to her marriage with the defendant, which occurred in March, 1874. In that connection she stated that she was living with a Mrs. Cockrell, in Dallas. That she occupied a room upstairs, with her infant child, by a former marriage. That Veal came and stayed all night at Mrs. Cockrell's, he being then a minister of the gospel in the Methodist Church, and was assigned a room upstairs, in which he slept. That some time during the night she was aroused from slumber, and saw standing by her bed a man. She raised up and told him to go away. "He kept standing there, and when I said that, he put his hand out to mine, and put his hand over my mouth, and he says, 'Hush, they'll hear you.' I was almost paralyzed with fright, but I seemed to realize what his object was, and threw myself backward, and threw my arms around my baby, but he pulled me away and ravished me. I was not conscious at the time I was outraged. When consciousness returned to me, Veal had gone." She further testified that "about a year after her marriage with defendant, while she was living on Ross avenue, in Dallas, one day some one knocked at the door and the servant came and opened it, and Captain Veal, the deceased, came in. That Veal, instead of going into the parlor, came into the room where she was sitting. That she got up, and he came toward her, with his arms out, just like he was going to take her in his arms; that she stepped back and said: 'You forget yourself, Captain Veal. You forget that I have a husband to protect me now.'" She told him to go away, and turned and left the room. "A number of years after that, while I was living in East Dallas, near the ice factory, and after I had moved in from Mesquite, my little girl came and said, 'There is a gentleman at the door.' I looked, and saw Captain Veal standing in the front door. I said: 'What do you mean, Captain Veal, by coming to my house? You know I do not want to see you. It makes me miserable to see you; and I don't want to see you.' And he said, 'I was taking a walk, and thought I would stop in and see you a few minutes.' And I told him he was not welcome, and did not want him to come near me. He only stayed a few minutes, and then left. These were the only two

occasions I ever saw Veal after I was married to Dr. Jones." She testified that in the fall of 1891, for the first time, she mentioned Veal's conduct toward her, both before and since her marriage with the defendant. That when she told her husband of these matters he became greatly excited, and acted like a crazy man. He wanted to go immediately to Fort Worth (where Veal then lived), but she begged him not to, and to let Veal alone. That repeatedly thereafter the subject was mentioned, the defendant bringing it up, and on such occasions ¹⁰⁰ he would act like a crazy man. This is the condensed testimony of Mrs. Jones introduced by the defendant. Over the objections of the defendant, the state proved by Mrs. Jones that she had conveyed certain property to her son, James Bullington, at the instance of Mrs. Cockrell and Mitch Gray, upon the eve of her marriage to the defendant; that this angered the defendant, and he also became angry at Mitch Gray and Mrs. Cockrell because of this matter; that the defendant forbade his wife visiting Mrs. Cockrell for nearly twenty years on account thereof; the squandering of the witness' property by the defendant; the effort of the witness, Mrs. Jones, and the defendant to have the disabilities of minority of James Bullington removed, in order to have him reconvey the property to witness; and also interrogated the defendant's wife as to advice given by the deceased to her in reference to her property, and that deceased transacted business for witness and defendant. These matters were all brought out upon what is termed a cross-examination of the witness. Mrs. Jones had testified to no facts to which these matters related or were germane; not one. When the state left the matter elicited upon examination in chief, and attempted to prove these things by Mrs. Jones, it made her its witness, and would have had the right to introduce her as a witness, and prove these facts, if appellant had never placed her upon the stand, if such facts could be proved by her, as was done in this instance. The wife can be a witness for the husband, but not against him. He is permitted to prove by her any fact that he desires. The state had the right to cross-examine her pertaining to the facts sworn to by her on direct examination. This would be a cross-examination. But when the state leaves the matter elicited in the examination in chief, and attempts to prove independent facts by her, it makes her its witness, and a witness against her husband, over his objections. This cannot be done. This is no new doctrine in this state, but is settled by a number of cases: See Creamer

v. State, 34 Tex. 173; Greenwood v. State, 35 Tex. 587; Hampton v. State, 45 Tex. 154; Washington v. State, 17 Tex. Crim. App. 197; Johnson v. State, 28 Tex. Crim. App. 17; Bluman v. State, 33 Tex. Crim. Rep. 43; Hoover v. State, 35 Tex. Crim. Rep. 342. The rule adopted by the courts in our state is illustrated by the right to cross-examine a witness. The cross-examination of an ordinary witness can only be conducted as to such matters as are pertinent to the matters brought out in the examination in chief; and in most jurisdictions in our country, where a party seeks on cross-examination to bring out matters not germane or pertinent to the examination in chief, if they are legitimate in evidence as competent testimony for the party seeking to bring them out on cross-examination, he will not be permitted to do so in the cross-examination of such witness, but when he comes to present his case he can introduce the witness on his own behalf. See the rule stated in 1 Greenleaf on Evidence, section 445, and authorities there cited. This practice renders patent the fact that the witness, so far as the matters which do not pertain to the examination in chief are concerned, is the witness of the party introducing them. Now, in some jurisdictions ¹⁰¹ the party is not required to stand the witness aside until he introduces his evidence, but may prove any pertinent fact by the witness introduced by the other party; but in doing so, if he departs from the matter elicited in chief, he makes the witness his own witness. So, applying either rule, the conclusion is inevitable that when the matter elicited in chief is departed from, or when the facts sought to be established upon a cross-examination, so called, are not pertinent or germane to that elicited in chief, the witness becomes the witness of the party attempting to prove such matter. Apply that rule to this case: The facts proved by Mrs. Jones, over the objection of the defendant, as above stated, had no relation whatever—were not pertinent or germane—to any fact elicited on her examination in chief. In a case it may be important as to when the defendant married. He introduces his wife, and proves the date of the marriage. If the rule be otherwise than that stated by us, the state would be permitted to prove by the wife all manner and every description of criminative facts against the husband. We are of opinion that the state had a right to prove by Mrs. Jones, because it was pertinent to her examination in chief, that she visited the deceased after the commission of the alleged rape and the other insulting conduct. Any fact or circumstance which tended to

show a friendly relation between Veal and Mrs. Jones after the insulting conduct above mentioned occurred is admissible, because pertinent to her examination in chief; but nothing else, according to this record, was permissible to be shown by the state on cross-examination. Now, while the court might have violated this rule in permitting the state to prove facts not germane to the examination in chief, yet, unless the facts are of such a character as to have a material bearing upon the issues involved, we would not reverse this judgment upon this ground. The question, therefore, is the materiality of these facts; their bearing, et cetera, when viewed with reference to the theories of both parties. The record develops the fact that the theory of the state was that Jones killed the deceased because he was trying to protect Mrs. Jones, and especially her son, James Bullington, from the avarice of Jones, the defendant; that Veal was the protector of Mrs. Jones and her son, and that he was a serious obstacle in the way of Jones in his (Jones') desire to obtain the possession and control of the property which belonged to Bullington, having been transferred to him just before the marriage of the mother with the defendant; his object was to get a deed from young Bullington to his wife for the property and real estate, and finally to have the control and management, and perhaps the absolute fee to the property, in himself, and that the deceased was an obstacle in the way of defendant to perfect his plans. The theory of the defendant was, that owing to the insults, outrages, and conduct of Veal toward his wife, he killed him, and that he was, therefore, guilty of nothing greater than manslaughter. These were the opposing theories. The battle was fought upon these lines; the state marshalling all the facts and circumstances in support of its theory, and the defendant all that supported his theory. Now, the state is permitted, over the objections ¹⁰² of the defendant, to lay the very foundation upon which this theory rests by the testimony of Mrs. Jones, which was not germane to anything elicited by the defendant. We think the testimony was very important when we look to the issues between the parties, and, not being pertinent or germane to her examination in chief, but being original testimony, she being the wife of the appellant, its admission, over the objection of appellant, was improper.

2. On the trial of the case, appellant introduced one T. G. T. Kendall, and proposed to prove by him that immediately after the communication made by the wife of appellant to him in the

fall of 1891 (about a year prior to the homicide) in regard to Veal's conduct toward her, that defendant, being in great distress of mind, sought his friend, said Kendall, to advise with him relative to the communication so made by his wife; that defendant was then in an excited and distressed condition of mind, and then and there told Kendall of said communication so made to him by his wife, to wit, that Veal had raped her in 1872, prior to her marriage with defendant, and after her marriage with defendant, in 1874 or 1875, and again in 1885, Veal had visited her with lecherous and carnal propositions, and that in said first visit Veal had sought to embrace his (defendant's) wife; defendant stating then and there to said Kendall that his (defendant's) wife had communicated such facts to him a few days prior thereto. Defendant further offered to prove that he expressed to Kendall his unqualified belief in the truth of the statement so made to him by his wife; that said Kendall then stated to defendant that he did not believe it, that he had known defendant's wife since she was a child, and that he would not believe that Veal or any other man had raped or insulted her, unless he heard it from her own lips; and said Kendall refused to talk with defendant, and left him. He also offered to prove by Kendall that shortly thereafter he saw Mrs. Jones (wife of appellant), and that she told him of the circumstance of Veal having raped her before her marriage with appellant, and of his subsequent visits to her as stated above. A few hours after this, Kendall again met defendant, and told him: "I have been to your house. I have seen and talked with your wife, and she has told me that what you stated to me in regard to Veal's conduct toward her was true." And said witness, in that connection, stated to appellant: "Every word your wife has stated to me and to you is true. Veal did everything she says he did. I know your wife to be incapable of telling a lie. A purer, better woman never lived, and I believe every word she says about it." Appellant also offered to prove by Kendall that repeatedly after said communications appellant talked with him about said matters up to within a few days of the homicide, and on all such occasions he was greatly excited, and appeared to be in a distressed condition of mind, and on such occasions was never calm, and always avowed his belief in the truth of said communications made to him by his wife. Appellant also proposed to prove by his wife that she made the statement to Kendall as above stated; and it was also proposed to prove by her that she

told Mrs. Cockrell these same matters. All of ¹⁰³ this testimony was objected to by the state, and excluded by the court, to which defendant excepted. Appellant insists that said testimony was admissible as tending to show that his defense set up in this case was not fabricated, and as tending to rebut the contention of the state that said matters were manufactured after the homicide. He also urges that said testimony was admissible as tending to establish both the truth of the facts communicated to defendant by his wife, and the defendant's belief in the truth of said communication; and also showed a communication to defendant by Kendall of the same facts communicated to the defendant by his wife, and that defendant's wife, long anterior to the homicide, had communicated said rape and subsequent insults by Veal to another than the defendant.

The statement of acts presents but one issue, and that is, whether appellant was guilty of murder in killing W. G. Veal, or whether he was guilty of manslaughter. If the jury believed the testimony of Mrs. Jones and appellant, the theory of appellant that it was nothing greater than manslaughter is clearly presented. If the jury did not believe the testimony of appellant and Mrs. Jones, then manslaughter, so far as the jury is concerned, is not in the case. The state's theory is, that the killing was not prompted by a passion aroused by this misconduct of Veal toward Mrs. Jones (wife of appellant), and that her testimony was manufactured to aid her husband in his defense. Every particle of testimony introduced by the state is for the purpose of making a case in opposition to the truth of the testimony of Mrs. Jones and defendant. Now, the rule of law is, that where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, the party introducing the witness can prove that before the motive existed (the motive in this case being to save the life or liberty of her husband), the witness made the same statement as that sworn to. To state the proposition in another form: if the opposing case is to the effect that the witness had a corrupt motive in swearing to certain facts, or that the witness recently fabricated the testimony for a purpose (in this case the motive being to prevent the conviction of appellant, and that, therefore, this testimony was manufactured after the death of Veal), the party introducing the witness (being the appellant in this case) can show that before the deceased (Veal) was killed the witness

(Mrs. Jones) told the same story which she swears to upon the trial. By such proof, the charge that it was fabricated, or prompted by an improper motive, is completely met and destroyed, if believed by the jury. The authorities are divided as to whether a witness can be supported because the adversary has shown that he made conflicting statements about the fact. We hold that this can be done. This, however, is a doubtful question when tested by the authorities. All the authorities agree, where the attack is made that the witness is prompted by improper motives, or has recently fabricated the story, that under either of these contingencies the party introducing his witness can prove his witness stated the same facts prior to ¹⁰⁴ the time when the motive could have existed, or prior to the occasion or circumstances prompting the manufacturing of the testimony. We have repeatedly written upon this subject, laying down substantially the same rules that we here state, and we deem it unnecessary to even cite the cases. In support of this last proposition we cite 1 Wharton on Evidence, 2d ed., art. 570. We also call attention to the long list of cases cited by Mr. Wharton in note 2 to this article. Apply these principles to this case: When the testimony in the case had been concluded, there was no evidence before the jury that Mrs. Jones or appellant had ever alluded to the outrages committed upon Mrs. Jones. The inference was cogent, indeed, that it was fabricated to save the life or liberty of the appellant. When the testimony of Mrs. Jones is scrutinized, it is placed in a very doubtful attitude. It would have been perfectly natural and reasonable for the jury to have inferred that she had manufactured her testimony because she wanted to save her husband. But suppose, in addition to her testimony (it being of a doubtful character standing alone), the evidence of Kendall had been received, would any man have entertained the same doubts about its truth as if her testimony had been without support? Law should be common sense, and there is no man but what would have much more readily believed her testimony if they had known that she told the same story before the death of Veal as that which she swears to on the trial. We are of opinion that this testimony was admissible for the purpose of supporting Mrs. Jones, and for the purpose of showing that Jones believed her statements. Again, in another view, this testimony was admissible as independent evidence, for the purpose of showing that the insulting conduct of Veal toward Mrs. Jones had been communicated to Jones prior to the homi-

cide. It is true that Mrs. Jones swore directly that she communicated the insulting conduct of Veal to her husband, but the defendant was not circumscribed by making such proof by his wife. As original testimony, it was entirely competent for the defendant to have introduced Kendall to show that Mrs. Jones communicated the conduct of Veal to him, and that he in turn told it to the defendant prior to the homicide.

3. The next question presented is, whether or not appellant had the right to prove the general reputation of deceased with reference to his being a man of chaste and virtuous habits and conduct toward women or otherwise. Appellant attempted to do this by a number of witnesses, and on objection by the state it was excluded by the court. We are of opinion that specific acts of lewdness (which appellant also claims were excluded) were not admissible. The general principle applicable to such specific acts is that it would involve too many issues, and the court cannot turn aside to try a vast number of collateral matters. But the rule is different as to general reputation. We are of opinion that proof of deceased's general reputation being bad in this particular was not admissible for the purpose of showing that he was guilty of the insulting conduct toward Mrs. Jones, but we are of the opinion that his general ¹⁰⁵ reputation was admissible for the purpose of determining whether Jones believed the story told him by his wife. We have no doubt of the correctness of this proposition. In addition to this, appellant had a right to prove that his general reputation was bad, and that he was informed of such reputation. This evidence is admissible, as before stated, to show that he not only believed what his wife had told him, but added greater probability to the presumption that he acted on this belief.

4. The next question presented is as to the action of the court in admitting the testimony of S. Q. Richardson as to seeing a woman in the office of Veal during the year 1885, and that Veal told witness that it was Mrs. Jones. The object of this testimony on the part of the state was doubtless for the purpose of showing the friendly relation existing between Mrs. Jones and Veal, and so to discredit her story with reference to Veal's insults toward her. Now, if this testimony had identified the Mrs. Jones seen in Veal's office by Richardson as the wife of appellant, or if it had a tendency to so identify her, it would have been admissible. But, in our opinion, there was no circumstance connected with this matter that sufficiently identifies her

as being the wife of appellant, and so the testimony should have been excluded. Again, what Veal said about it was clearly hearsay evidence, in the absence of any testimony tending to identify Mrs. Jones there mentioned as the wife of the appellant. This testimony, as presented, is purely hearsay. If, in fact, Mrs. Jones visited Veal, as attempted to be shown by Richardson, this would have been a very strong circumstance with the jury, tending to negative or disprove everything that she had said about the insulting conduct of the deceased. The conclusion would have been very strong, indeed, that she had manufactured this story for the purpose of saving the life and liberty of her husband. Now, the rule is that no conclusion can rise higher than the facts from which it is made. When a conclusion is sought to be made, the fact upon which it is based must be clearly proved. Vague suspicions, leading to hurtful conclusions, are not permitted in law. See Burrill on Circumstantial Evidence, 126. This is the second appeal of this case, appellant having previously been convicted of murder in the first degree, but the case was reversed, because it was not properly tried: *Jones v. State*, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46. The questions discussed in this opinion are upon the admission and exclusion of evidence, which, in our opinion, go to the merits of the case. The errors are not mere irregularities, but are in regard to the admission and exclusion of evidence upon vital questions, and it is impossible for us to tell what influence the excluded testimony might have had upon the jury, or what influence the admitted testimony may have wrought upon their minds. The rules with regard to said testimony, it occurs to us, are obvious. They are found in the text-books on evidence, and have been followed by this court in a number of decisions. We cannot afford to set a bad precedent by their violations, nor are we inclined to do so. In the discharge of our duty, the rules of evidence must be observed in all cases. This is for the common benefit of all, in order that all may alike be protected by the rules of law. Because, in our ¹⁰⁶ opinion, these rules were not adhered to and enforced in the court below, the judgment is reversed, and the cause remanded,

After the above opinion was handed down, a motion for rehearing and brief in behalf of the state was filed by Hon. Mann Trice, assistant attorney general:

¹¹⁵ DAVIDSON, J. We have carefully considered the motion for rehearing presented by the assistant attorney general.

At a former day of this term this court reversed the judgment of the lower court on four errors committed. We will go over the grounds again, and re-examine the record.

1. The first error is in relation to the court's permitting the state to prove by Mrs. Jones, wife of appellant, facts and circumstances not germane to anything she had sworn on her testimony in chief. We held, and still hold, that this cannot be done. The law will not permit the husband or wife to be a witness against each other. If the husband is upon trial, and his wife is a witness, and she should swear to facts injurious to him, in answer to questions propounded, he could not complain, but, where she swears to certain facts and circumstances, the cross-examination must be confined to the matter elicited in chief. Of course, everything which is legitimate for the purpose of testing her knowledge of the fact sworn to, her bias, her prejudice, in fact any matter that goes legitimately to discredit her, is admissible on cross-examination. However, where the state leaves the matter testified to in chief, and proposes to prove independent criminative facts against the accused, this would not be a cross-examination of the witness. When the matter is departed from, the witness ceases to be a witness for her husband, and becomes a witness for the state. This is absolutely demonstrated by the overwhelming weight of the authority. Mr. Wharton, in his work on Evidence, section 529, says: "Although, in England, counsel, in cross-examination, are permitted to ask questions bearing on the whole case, so as to bring out matters of independent defense, in this country, in most jurisdictions, cross-examinations, with greater propriety, are confined to the subject of the examination in chief, and that of the credit of the witness. If a matter of defense is to be proved, this must be reserved until the cross-examining party has opened his case, when he is at liberty to call the witness to prove such defense." In support of this proposition, Mr. Wharton cites not less than fifty cases, from the states of New Hampshire, New Jersey, Pennsylvania, Michigan, Indiana, Illinois, Iowa, Wisconsin, Minnesota, Kansas, Nevada, Georgia, California, Arkansas, Nebraska, and a number of others. The supreme court of the United States holds that, where the matter sworn to in chief is departed from on so-called cross-examination, the witness becomes the witness of the party who elicits this matter. To illustrate the proposition: The defendant ¹¹⁶ introduces a witness to prove certain facts. The state cross-examines as to these facts, and then proves in-

dependent facts by the witness—facts which are not germane to the examination in chief. So far as these facts are concerned, the witness becomes the witness of the defendant. Now, let us illustrate the question before us: An accused party is upon trial for murder. It becomes relevant and important to know when he and his wife were married, or when a certain child of theirs was born, or whether he was at home at a particular hour of a certain night, et cetera. He introduces his wife, and she swears to the date of the marriage, to the birth of the child, and that her husband on that particular night was at home. The state can cross-examine her thoroughly as to the marriage, where it occurred, who attended, who were the bridesmaids, grooms, and how old the parties were, et cetera, and then institute an inquiry as to her prejudice, contradictory statements, if there are such, and every matter which is proper to test her means of knowledge and credibility. So, with reference to the birth of the child, and the supposed alibi. This testimony is elicited from the wife, to wit, the marriage, birth of the child, and proof of the alibi. After having cross-examined the witness pertaining to these matters, the state proposed to prove by the defendant's wife that he had a motive to kill the deceased; that he had threatened to kill deceased; that he had arms suitable for that purpose, corresponding with those used at the homicide, et cetera. These matters are not relevant at all to the marriage, the birth of the child, or the alibi; and, when the state proves these facts by the wife, she then becomes the witness of the state, and is emphatically forced to testify against her husband. We cannot give a clearer illustration of this question than that above. In line with the cases referred to above will be found the case of *People v. Briggs*, 60 How. Pr. 17. In that case, Osborn, P. J., illustrates a provision of the New York statute which provides that the husband and wife shall not testify against each other, and which might have been inserted for a certain purpose, to wit, he says: "For instance, a wife might be called as a witness on behalf of the husband, to prove some one isolated fact. It may be that the legislature, by saying that she should not be compelled to testify or give evidence against him, intended to prevent, upon cross-examination, an inquiry into any other matters not inquired into upon the direct examination, and which might be very damaging to the husband, and so vice versa." We deem it unnecessary to add additional authorities upon this subject. In Texas and other states the witness is not required to

stand aside until the opposing party introduces his evidence. The adverse party can cross-examine the witness thoroughly pertaining to the matters elicited in chief, and will not be required to wait until he presents his testimony in order to prove facts relevant to the main issue, by the witness. He can prove any competent fact by the witness on what is called cross-examination, but this rule does not affect the question at all. Suppose, upon the so-called cross-examination, the matter elicited in chief is completely departed from, and new matter is sought to be established by the witness, which is relevant to the main ¹¹⁷ issue, would the party be permitted to lead the witness in regard to this matter? Would he not still, though he could elicit the matter, be held to examine him just as if he had introduced him? Certainly. By way of illustration: The plaintiff introduces a witness, and proves a relevant fact. The adverse party can cross-examine him thoroughly as to this fact. After doing so, if he leaves this matter, and proposes to prove important relevant facts by the witness introduced by the plaintiff, he is not bound to require him to stand aside, but can do so. Should he propose to prove the facts by leading questions, and the plaintiff objects, not to his right to prove the facts, but leading the witness, this tests the question as to whose witness he is as to this matter. Evidently, he is then the witness of the defendant.

The assistant attorney general insists that anything pertaining to the *res gestae* can be proved by the wife. In his motion for rehearing he says: "I concede that the general rule is as stated by the court, that the cross-examination of the wife should be confined to the matters drawn out on the examination in chief, or be germane thereto; but there are well established exceptions to this general rule, which is universal and binding—that is, the right of cross-examination extends to all matters connected with the *res gestae*, and as to credit." *Res gestae* of what? *Res gestae* of what she said in chief? If so, we do not object. Does he mean the *res gestae* of the homicide? If so, we certainly cannot concede any such proposition. Mrs. Jones did not say one word about the homicide. She was not a witness to the homicide, and knew nothing of the facts attending the homicide. If *res gestae* can be established by the wife or husband, upon cross-examination, then the assistant attorney general's exception should be the rule, instead of that stated by him to be the rule, for we have never yet been able to place any limit to what is called *res gestae* of a homicide. Our understanding of this

rule, as explained by Mr. Stephens in his work on Evidence, is that the homicide has its *res gestae*, or attending circumstances; that any relevant fact to the main fact is its *res gestae*, until you extend it into a field in which the fact has no probative force. It would be a novel case in which a relevant fact would not be *res gestae* of the main fact, or which would not have its own *res gestae*. Now, we concede that anything that is *res gestae* to what was said is admissible. Mrs. Jones testified as to the rape by Veal, and his subsequent insulting conduct toward her, and that Veal and appellant had been friendly before she communicated these facts to appellant. The state proved by her, over the objections of appellant, all that matter pertaining to the effort to have the disabilities of her son removed, so that he could make a deed to her, et cetera. We most seriously would ask if this matter was *res gestae* to the rape or subsequent insulting conduct? Was it calculated to explain, modify, or to affect in any manner her testimony in regard to Veal's conduct? How and in what manner did it bear on the fact that Veal and Jones had been friendly? If this evidence be a part of the *res gestae* of the efforts to remove the disabilities of the minor son, ¹¹⁸ then could there be any relevant fact which would not have been *res gestae*? And instead of confining the cross-examination, so called, to the matters elicited in chief, we would never find a case that did not have *res gestae* enough to admit anything they proposed to prove. Would not this idea of the assistant attorney general's theory of *res gestae* be a most remarkable, novel application of this doctrine? We confess that, outside of this motion for rehearing, we have never found such an extension of the doctrine. To condense: It means that the wife can be made a witness against her husband in the face of the prohibition of the statute in regard to any matter relevant to the case, whether it be germane to what she had sworn in chief or not.

It is contended, however, by the assistant attorney general, that in fact the wife was not compelled to testify to any fact which was not germane to her testimony in chief; that there was merely an effort to make her testify to such facts. A very slight investigation of this record will demonstrate that several very important facts were sworn to by her, over the objection of appellant. For instance, we refer to bill of exceptions number 3, which was approved by the trial judge. The bill was reserved to the action of the court permitting the state to elicit from Mrs.

Jones a great deal of testimony with reference to the transfer by herself of a large amount of property to her infant son, the day before her marriage with the defendant, and thus laying the foundation of the theory of the state in proving a motive for the killing other than that assigned by the appellant. The importance of this testimony must be conceded, for the state relied upon these matters as a motive for the killing, and for the purpose of avoiding the testimony, relied upon by the appellant, regarding the insulting conduct of Veal toward appellant's wife as the cause for the killing. Mrs. Jones had not testified for the defendant in regard to this property transaction, and it was brought out from her by the state, over appellant's objection. If appellant killed Veal on account of his supposed connection with the transfer of the property, it might be considered by the jury as an answer to Mrs. Jones' evidence in regard to the insulting conduct, and tend to show that her testimony in regard to such insulting conduct was a fabrication. Then the antagonism between the two theories was potent and sharp, the defendant relying upon what his wife and Kendall had told him with reference to the insulting conduct of Veal toward his wife, and the state relying upon the fact that the motive operating upon Jones' mind at the killing grew out of the property transaction.

2. The assistant attorney general contends that this court erred in reversing the judgment because the trial court refused to permit Mrs. Jones to be corroborated by the statement of the witness Kendall, in reference to the alleged rape and insulting conduct. He says: "It is never admissible to sustain a witness by proof of general good character or otherwise, until the reputation of the witness is assailed for truth and veracity, or impeached by showing contradictory statements. These are conditions precedent to offering testimony to corroborate or sustain a ¹¹⁹ witness." The original opinion in this case does not insinuate that the state had proved that Mrs. Jones had made contradictory statements about any matter. In that opinion we never discussed the question as to whether the witness could be supported when thus attacked, to wit, by proof of contradictory statements. But, since our attention has been called to this subject, we will go further, and discuss the question as to whether a party can support his witness when thus attacked. We deemed it unnecessary to discuss this in our former opinion. Now, then, was there an effort made to show that Mrs. Jones had made contradictory statements about this matter?

There was not, but there was an effort made, and it is claimed that it was successful, to show that her conduct gave the lie to the tale she told; that after this rape by Veal, et cetera, she visited Veal; that business relations existed between them, et cetera. There is no difference in the character of the attack. If the state had proved that she had made contradictory statements in regard to the matter testified to by her, every decision in this state is to the effect that she could have been supported by proof that she made the same statement to others as that sworn to on the trial. Acts speak as loud, and demonstrate the condition of the mind as effectually, as words. For what purpose was the evidence introduced, tending to show that she was on friendly terms with Veal, if it was not to establish the fact that what she had said about the insulting conduct was false? There could have been no other purpose. In fact, the evidence would not have been relevant for any other purpose in this case. This attack was as effectual, if not more so, than to have proved that she did make a contradictory statement. Being thus attacked, under all the authorities in this state, the wife could have been supported.

The assistant attorney general cites us to Mr. Wharton and authorities which deny the correctness of a proposition that a witness can be supported when thus attacked. We have written a number of opinions in which we called attention to the fact that Mr. Wharton and a great many cases question or deny the correctness of the proposition. We have not invented this rule for this case, but have applied it to every case in which the question has arisen. The original opinion was based upon this proposition, found in Mr. Wharton's work on Evidence, section 570, and the same section relied on by the assistant attorney general, and the rule is not questioned by any authority, to wit: "On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted. It has consequently been ruled that statements made by a witness corroborating his evidence upon the trial, such statements being uttered soon after the transaction in litigation, and at a time when the witness could not have been subject to any disturbing influences, are competent when proof has been offered to impeach him, by showing that he had recently fabricated the narrative, or that he testified corruptly." In support of this propo-

sition, Mr. Wharton cites a ¹²⁰ great number of authorities, common law as well as from the different states of this Union. And in the note to said text we find this: "Russell (3 Russell on Crimes, 593) holds 'that the better opinion seems to be that such evidence is not admissible, except in cases where the counsel on the other side impute a design to misrepresent, from some motive of interest or relationship.'" And this note is supported by a great number of authorities, all of which are English cases, including as well Phillips, Starkie, and Hawkins. These excerpts from Mr. Wharton will be found in the very same section quoted and relied upon by the assistant attorney general. If we had based our ruling upon the fact that Mrs. Jones was supported, because proof had been made tending to show that she had made contradictory statements, the excerpt from Mr. Wharton contained in the motion of the assistant attorney general would have had some explanation. But, as before stated, the appellate courts of this state have held, in an unbroken line of decisions, that where a witness is attacked by showing contradictory statements, the witness can be supported. We are not called upon to go back on that rule, for, as above stated, the opinion is not upon that subject. Now, will any one deny but what the state's case—the opposing case—most powerfully suggests that Mrs. Jones had fabricated her testimony to save her husband's life? There was the motive, the cause assigned, and no doubt argued with great force and effect before the jury. To meet this, appellant had the right to show that his wife did not fabricate this testimony to save her husband; that she told the same story before the killing of Veal. For the first time in this state, so far as we know, the motion for rehearing in this case questions the rule, where, when a witness is attacked by showing that he testified corruptly, or had recently fabricated his testimony for a purpose, he could be supported by proof that he (witness) made the same statements before the motive could have existed, and that it was not fabricated, because he had told the same story before. In this case the motive on the part of Mrs. Jones was to save the life of her husband, if her testimony was false. This was the opposing case of the state on the trial.

3. We have no doubt of the correctness of our views in regard to proof of the general reputation of Veal as being a man of unchaste and lecherous habits, as applied to the facts of this case. By analogy, we could adduce any number of cases; for in-

stance, the case of Horbach v. State, 43 Tex. 242. In that case Judge Roberts properly held that the general reputation of Thomas was admissible as a dangerous and violent man when drinking. That testimony was not for the purpose of excusing Horbach for killing Thomas, but for the purpose of determining the light in which Horbach had a right to view the acts and conduct of the deceased, in connection with his bad character. The same principle is applicable here. Did Jones believe what his wife told him? He had a right to look to the general reputation of Veal upon that subject; and the jury had a right to know the general reputation of Veal, in order to determine whether or not Jones believed the story told him by his wife.

121 4. The assistant attorney general contends that the court erred in holding that the testimony of S. Q. Richardson was inadmissible, and insists that, as other witnesses testified that Mrs. Jones and Veal met on friendly terms, therefore the testimony of said Richardson was admissible. Now, Richardson does not swear that the Mrs. Jones who testified in this case, and the wife of the appellant, was the woman that he saw in Veal's office. He swears that Veal said that a certain woman who visited his office was Mrs. Dr. Jones. Suppose Veal had said that it was Mrs. Dr. Jones, the wife of Dr. R. H. Jones, this appellant; would it be contended that this would have been admissible? Would it not be hearsay testimony? If Richardson knew that Mrs. Jones, the wife of appellant, was the lady who visited Veal, and of whom he was testifying, there would be no necessity of stating what Veal said about it. If Richardson knew this witness to be the lady, and that she and Veal conversed, all that was said would have been admissible, because Richardson himself would have identified Mrs. Jones as the wife of appellant. However, he knew nothing of this himself. The state simply proved by him that a woman visited the office of Veal, and that Veal said her name was Mrs. Dr. Jones. As we have said, Veal might have told Richardson that she was Mrs. Dr. Jones, the wife of Dr. R. H. Jones, this appellant; yet, unless Richardson knew that she was the witness, Mrs. Dr. Jones, all that Veal said would have been hearsay.

We have gone over the motion made for a new trial made by the assistant attorney general, as well as the transcript herein, and our views have not been shaken in the least, but confirmed. The motion for rehearing filed by the state is overruled, and, in accordance with the original opinion, the judgment of the lower court is reversed, and the cause remanded.

IN THE SUBSEQUENT CASE of *Gaines v. State*, 38 Tex. Crim. Rep. 202-220, it was again decided, on the authority of the principal case, that if the wife of the accused is a witness for him on his trial for murder, her cross-examination must be limited strictly to such facts as are pertinent and germane to matters brought out on her examination in chief, and it is reversible error to permit her to be cross-examined against objection, as to important collateral matters injurious to the accused, or to permit her, after such illegal cross-examination, to be impeached by proof of her contradictory statements as to such matters, and it is beyond the power of the court to cure the error and to so limit and control such evidence in the charge to the jury as to deprive it of its injurious effect.

WITNESSES—COMPETENCY OF WIFE IN CRIMINAL CASE. Under a statute providing that "husband and wife may be witnesses for each other in all criminal cases, but they shall not be required to testify against each other, as witnesses for the prosecution," neither is a competent voluntary witness against the other: *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440, and note. Extended note to *State v. Boyd*, 27 Am. Dec. 377. See the note to *Hitchcock v. Moore*, 14 Am. St. Rep. 481; *Crawford v. State*, 98 Wis. 623, 67 Am. St. Rep. 829, and note.

WITNESSES.—CROSS-EXAMINATION must be confined to the matters about which the direct testimony was given: *State v. Eifert*, 102 Iowa, 188, 63 Am. St. Rep. 433, and note.

WITNESSES — CROSS-EXAMINATION—MAKING ONE PARTY'S OWN WITNESS.—The defendant has no right to cross-examine the plaintiff's witness as to matters of defense which have no dependence upon or necessary connection with his direct testimony, but the defendant must make the witness his own witness as to such testimony: *Mitchell v. Welch*, 17 Pa. St. 339, 55 Am. Dec. 557, and note. But cross-examination as to new matter, when it is part of the *res gestae*, is allowable: *Bank v. Fordyce*, 9 Pa. St. 275; 49 Am. Dec. 561.

WITNESSES—IMPEACHMENT.—If it is charged, either directly or by implication, that the testimony of the witness is a recent fabrication, inconsistent with his previous declarations or conduct, and having its origin in some event powerfully affecting his interests, or in some change in his situation with reference to the transaction or to the parties, it is admissible to rebut the imputation by proving declarations prior to such event or change, agreeing with what he now swears to be the truth: See the extended note to *Johnson v. Patterson*, 11 Am. Dec. 759.

HOMICIDE—INSULTING LANGUAGE TO WIFE AS A DEFENSE.—The general rule is that words, however aggravating, are not considered sufficient provocation to extenuate the killing of a person, so as to render it manslaughter: *Commonwealth v. York*, 9 Met. 93, 43 Am. Dec. 373; *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711. But in Texas, by statute, it is provided that insulting words toward a female relation should be adequate cause to reduce a homicide from murder to manslaughter: *Hudson v. State*, 6 Tex. App. 565, 32 Am. Rep. 593.

EX PARTE NEWMAN.

[38 TEXAS CRIMINAL REPORTS, 165.]

BAIL IN CAPITAL CASE—BURDEN OF PROOF.—On an application by habeas corpus for bail in a capital case, the burden to establish the fact that the proof is evident is upon the state and not upon the relator to prove the contrary.

BAIL—ACCUSED, WHEN ENTITLED TO.—Unless the case is a capital one and the proof is evident of this fact, and unless the proof is evident that the prisoner is guilty of a capital crime, he is entitled to bail, and the burden of proof is on the prosecution to show that he is not so entitled.

AN INDICTMENT FURNISHES NO PROOF that an accused is guilty of a capital crime, much less that he is guilty of a capital crime of which the proof is evident.

HABEAS CORPUS—BURDEN OF PROOF.—Although the statute gives the relator the right to open and close the argument in a habeas corpus proceeding, it does not necessarily follow, nor follow at all, that the burden of proof is upon him.

W. Kelso, J. M. Goggin and H. C. Carter, for the relator.

M. Trice, assistant attorney general, for the state.

¹⁶⁵ **HURT, P. J.** Appellant was charged by indictment with robbery by the use of firearms. The indictment charges a capital offense. Upon the trial below, relator introduced one witness, Lewis, the prosecutor and alleged injured person. This witness failed to identify the relator as one of the parties engaged in the robbery. The names of a number of witnesses were on the back of the indictment. These witnesses were not used by the relator. The testimony of this witness shows that other parties were engaged in the robbery, but that he did not know who they were. The court below refused bail, holding evidently that the burden was upon the applicant to establish the fact that the proof was not evident that he was one of the parties engaged in the robbery, which is conceded to be a capital offense. In this view of the question, the court below is supported by the opinion of Judge Willson in *Ex parte Smith*, 23 Tex. Crim. App. 100. The question is therefore presented whether or not the rule laid down in that case is correct. If the burden is upon the defendant to show that the proof is evident that it was not a capital offense, or that he was not a participant therein, then, in this case, the relator has not discharged the burden. If, however, the burden is upon the state, the relator is entitled to bail. Now, the question is, Upon whom is the burden in such a case? The constitution provides ¹⁶⁶ that all prisoners shall be bailable by sufficient sureties, except for

capital offenses when the proof is evident. We hold that the general rule is in favor of bail, but that there is an exception to this general rule, and that the party relying upon the exception must prove it. The exception is in favor of the state. Unless the case be a capital one, and the proof is evident of this fact, and unless the proof is evident that the prisoner is guilty of a capital crime, he is entitled to bail. He stands upon the constitution of this state, which grants bail to all prisoners with sufficient sureties; and, as before stated, the party relying upon the exception must prove it. We are also of opinion that the indictment furnishes no proof that he is guilty of a capital crime, much less that he is guilty of a capital crime in which the proof is evident. Let us concede for the argument that the legislature could shift the burden of proof, and could make an indictment a *prima facie* case of proof evident. This has not been done by the legislature, and we must pass upon the constitutional provision as it stands. Through great caution, it is provided in the section of the constitution that this provision shall not be so construed as to prevent bail after indictment found upon the examination of the evidence in such manner as may be prescribed by law. The legislature has never prescribed how the examination shall be conducted. Hence, it remains just as if that provision was not inserted, and will remain so until the legislature acts upon the subject. A great many states hold, under constitutions substantially similar to ours, that, after indictment found, the person is not entitled to bail, and go to the extent of holding that inquiry cannot be made into the subject after indictment is found. Now, this provision of the constitution provides that it shall not be so construed as to prevent bail after indictment found. It may be contended, because the act of the legislature gives the relator the right to open and conclude the argument in a habeas corpus case, that it therefore follows that the burden of proof is upon him. But such we do not construe to be the meaning of article 199 of the Code of Criminal Procedure of 1895. The general rule is, that the party having the burden of proof has the opening and conclusion. This statute appears to us simply to guarantee to an applicant in a habeas corpus proceeding an additional advantage, as an exception to the general rule; for, if the burden was upon him, he had this right, independent of the statute. The construction contended for would require, in a case like this, that the applicant go into the enemy's camp, and examine the adversary's wit-

nesses as his own. He would not be authorized to cross-examine them, nor to impeach them. Such a construction environs an applicant for bail in a writ of habeas corpus with difficulties which we do not believe the constitution authorizes; and certainly a statute that would impose this burden ought to be clear and unambiguous, and not be left to implication or inference merely. Entertaining these views, the case of *Ex parte Smith*, 23 Tex. Crim. App. 100, and others following that authority, are hereby overruled, and the rule as to the burden of proof above indicated is now established as the mode of procedure ¹⁶⁷ in this state. We are not to be understood as overruling all of the rules stated in the *Smith* case, but only that which pertains to the burden of proof.

The judgment is reversed, and the relator is granted bail in the sum of three thousand dollars.

BAIL IN CAPITAL CASE.—All persons have a constitutional right to bail by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great: *Ex parte Goans*, 99 Mo. 193, 17 Am. St. Rep. 571.

BAIL OF ONE CHARGED WITH MURDER.—A prisoner may be admitted to bail on habeas corpus, if charged with murder by a coroner's inquest, but not after the finding of an indictment of a grand jury, because in the former case the court may look into the depositions, and in the latter the evidence is secret: *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328.

BAIL—INDICTMENT AS PROOF OF GUILT.—The guilt of a prisoner while on trial, cannot be presumed from the fact that an indictment has been found against him; but between the time of the indictment and the trial, so far as the intermediate proceedings are concerned, it furnishes the strongest possible evidence of guilt: *Hight v. United States*, *Morris*, 407, 43 Am. Dec. 111. An indictment for a capital offense furnishes of itself presumption of guilt too great to entitle a defendant to bail as a matter of right under the California constitution, or as a matter of discretion under the state legislation in that regard: *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77; *Ex parte Goans*, 99 Mo. 193, 17 Am. St. Rep. 571. Bail may sometimes be allowed in capital cases after indictment, though no special or extraordinary circumstances exist: *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77, and monographic note thereto.

EX PARTE BROWN.

[88 TEXAS CRIMINAL REPORTS, 295.]

CONSTITUTIONAL LAW—TITLE OF ACT.—An act known as the "cold storage act," and entitled, "an act to define and prevent cold storage in a local option county, precinct, city, town, or subdivision of a county, and to affix a penalty for running, keeping, or maintaining them in such county, city, or town, or subdivision, sufficiently embraces the subject-matter of the act, and is not within a constitutional provision invalidating laws where the substance of the act is not embraced in the title.

CONSTITUTIONAL LAW—POLICE REGULATIONS.—The state may interfere under its police power to prohibit the keeping of property injurious to the lives, health, and comfort of all persons, but it is not authorized, under the guise of a police regulation, to invade the fundamental privileges and interfere with the full enjoyment by the citizen of his recognized property rights, and if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those subjects, it is the duty of the courts to so adjudge.

CONSTITUTIONAL LAW—POLICE POWER—KEEPING INTOXICATING LIQUORS.—The keeping of liquors in his possession by a person whether for himself or another, unless he does so for the illegal sale thereof, or for some other improper purpose, cannot injure or affect the health, morals, or safety of the public. Hence a statute prohibiting such keeping in possession is not a legitimate exercise of the police power, but it is an abridgment of the privileges and immunities of the citizen, without any legal justification, and therefore void.

CONSTITUTIONAL LAW—LOCAL OPTION.—A constitutional provision giving the legislature authority to enact laws with regard to the adoption of local option by the people is exclusive of any other method to be pursued by the legislature for dealing with the question, especially so far as the same territory is concerned where local option has been adopted.

CONSTITUTIONAL LAW—POLICE POWER—INTOXICATING LIQUORS.—An attempt by the legislature to make the keeping of liquor by one citizen for another in a local option territory, whether in a house, tent, or anywhere else, and whether for a consideration or without, a crime, or an attempt on the part of the legislature to make it criminal for a person who may be the owner or proprietor of any building, in local option territory, to solicit or take and order for another person for intoxicating liquors, to be sent or delivered to the proprietor or owner of such house for the person giving such order, is without authority of law, as violative of the citizen's fundamental right to use his own property as he pleases, not injuring another person, and it is not competent for the legislature, under its power of police regulation, to impair the legal ownership and holding of one's property, either by himself or by another person.

W. W. Nelms, for the relator.

M. Trice, assistant attorney general, for the state.

³⁰¹ HENDERSON, J. Appellant was charged by information in the county court of Williamson county with violating what is

known as the "cold storage act." He was arrested under said information, and sued out a writ of habeas corpus before the county judge, who, after hearing the case, remanded the applicant to the custody of the sheriff to answer said information; and from said order defendant prosecutes this appeal.

The contention of appellant is, that the act of the twenty-fifth legislature, page 128, entitled, "An act to define and prevent cold storage in a local option county, precinct, city, town, or subdivision of a county, and to affix a penalty for running, keeping, or maintaining them in such county, city, or town, or subdivision," is unconstitutional and void. We understand the grounds of his contention to be that said act is void: 1. Because the caption of said act is not in accordance with section 35 of article 3 of the constitution; 2. Because the act itself is an invasion of the rights of private property, not authorized by the constitution; 3. That said act is violative of section 20 of article 16 of our state constitution (said section known as the "local option clause").

Without quoting in extenso the act in question, we will condense the provisions of said act. In section 1 an attempt is made to define what a cold storage is. It provides: 1. That any building, et cetera, in any local option district, which may be kept or maintained for the purpose of storing, cooling, or keeping intoxicating liquors, et cetera, for others, is a cold storage; 2. Or any building, et cetera, in any local option district, which shall be used or kept to store or keep for any other person than the owner any intoxicating liquors, et cetera, is a cold storage; 3. Or any such building, et cetera, in any local option district, where the agent, owner, et cetera, may solicit or take any orders from others for intoxicating liquors, to be sent or delivered to such owner, et cetera, for the person giving such order, shall constitute a cold storage. The second section of said act provides, substantially: 1. That any owner, agent, et cetera, who shall keep, et cetera, any cold storage house, or be interested in keeping the same, in any local option district, shall be guilty of a misdemeanor, et cetera; 2. Any person who shall solicit or take orders for any intoxicating liquors to be sent or shipped to ³⁰² any person who may keep, et cetera, or be interested in the keeping, et cetera, of any cold storage in any local option district, shall be guilty of a misdemeanor, and fined not less than one hundred dollars nor more than five hundred dollars, and, in addition thereto, shall be imprisoned in the county jail not less than

twenty-five nor more than one hundred days. Section 3 provides, if any owner, et cetera, of any cold storage, where local option is in force, shall solicit or take any order for intoxicating liquors to be shipped or sent into any such local option district, and such intoxicating liquors shall be shipped or sent therein by reason of such order, that the same shall constitute a sale in such local option district.

The information against appellant charges that, in a local option district, "he was the owner and proprietor and the agent and employé of the owner and proprietor of a cold storage, and was interested in the keeping, maintaining, and managing a cold storage within said justice precinct, and that he did then and there solicit and take orders for intoxicating liquors to be shipped to a person who then and there kept, maintained, and managed a cold storage, and to be shipped to the agent and employé of a cold storage, and in the care of the proprietor, agent, and employé of a cold storage."

We are not inclined to regard said act as violative of section 35 of article 3 of the constitution, as, in our opinion, the title sufficiently embraces the subject matter of the act. The effect of the act, however, is to make criminal the act of any person who may keep or maintain a house in a local option district for the storage, keeping, or cooling of intoxicating liquors for others, or the owner, proprietor, et cetera, of any building, et cetera, which shall be used to store such intoxicating liquors for others than the owner, for it makes criminal the act of any person who, as owner, proprietor, et cetera, may solicit orders from others for intoxicating liquors to be sent or delivered to such owner, et cetera; that is, it proposes to make criminal the act of keeping or storing any intoxicating liquors for others than the owner of such building, in any house, building, et cetera, in any district where local option is in force.

If we had no provision of the constitution on the subject of local option, we believe that this act would be unconstitutional, as an invasion of the fundamental right of a citizen to the free use and exercise of property, and that the legislature would not be authorized, under the guise of a police regulation, to so interfere with the enjoyment on the part of the citizen of his property rights. Intoxicating liquors are regarded as property, both in the state and nation, and it is not necessary to refer to acts of legislation or decisions of the courts in which intoxicating liquors are so regarded. Furthermore, we have a distinct con-

stitutional provision on the subject of the power of the legislature in regard to the liquor traffic. That constitutional provision is as follows: "The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice precinct, town, city, or such subdivision of a county as may be designated by the commissioners' court of such county, may, by a majority vote, determine from time to time whether the sale of intoxicating ³⁰³ liquors shall be prohibited within the prescribed limits": Const., art. 16, sec. 20. It occurs to us that this expression of the will of the people on the subject is exclusive of any other method to be pursued by the legislature. Whatever may be said as to the power of the legislatures of other states, with no express provisions of their constitutions on this subject, to legislate in regard to the liquor traffic under the general police power, the same does not apply with us. We have an express provision on the subject, and that provision was intended to prescribe a method of dealing with the question, and to exclude any other rule or method, at least so far as local option territory is concerned: See *Holley v. State*, 14 Tex. Crim. App. 505; *Stallworth v. State*, 16 Tex. Crim. App. 345; *Steele v. State*, 19 Tex. Crim. App. 425; *Ninenger v. State*, 25 Tex. Crim. App. 449.

In *State v. Gilman*, 33 W. Va. 146, almost the identical question here presented came before that court; and the views of the learned judge who delivered the opinion are so well expressed that we give them in full: "Has the legislature of this state the constitutional power to make such an act a crime? The fourteenth amendment to the constitution of the United States declares: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'; and the same amendment makes all persons born or naturalized in the United States citizens thereof. It is conceded that the 'privileges and immunities' here protected are such only as are in their nature fundamental—such as belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states of the Union, from the time of their becoming free, independent, and sovereign. What these fundamental rights are it is not easy to enumerate, the courts preferring not to describe and define them in a general classification, but to decide each case as it may arise. The following, however, have been held to be embraced among them: 'Protection by the government; the enjoyment of life and lib-

erty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject to such restraints as the government may justly prescribe for the general good of the whole': Washington, J., in *Corfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3230; *Connor v. Elliott*, 18 How. 591; *In re Parrott*, 6 Saw. 349, 1 Fed. Rep. 481; 6 Meyers Fed. Dec., sec. 1000; *Butchers' Union Slaughter-House Co. v. Crescent City Livestock Landing Co.*, 111 U. S. 746. These are inalienable and indefeasible rights, which no man, or set of men, by even the largest majority, can take from the citizen. They are absolute and inherent in the people, and all free governments must recognize and respect them. Therefore, it is incumbent upon the courts to give to the constitutional provisions which guarantee them a liberal construction, and to hold inoperative and void all statutes which attempt to destroy or interfere with them: *Cooley's Constitutional Limitations* (35), 44. It can hardly be questioned that the right to possess property is one of these rights, and that that right embraces the ³⁰⁴ privilege of a citizen to keep in his possession property for another. It is not denied that the keeping of property which is injurious to the lives, health, or comfort of all persons may be prohibited under the police power. The maxim, '*Sic utere tuo ut alienum non laedas*,' being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. But it does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the state; and much less is such the case when the statute is merely claimed by its defenders to be intended for that purpose. The court, in its opinion in *Mugler v. Kansas*, 123 U. S. 661, says: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution': *Mugler v. Kansas*, 123 U. S. 661. The keeping of liquors in his possession by a per-

son, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public; and therefore the statute prohibiting such keeping in possession is not a legitimate exercise of the police power. It is an abridgment of the privileges and immunities of the citizen, without any legal justification, and therefore void. But it seems to me the said provision of the statute is in violation of that provision of our state constitution, which declares that 'laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits of this state': Const., art. 6, sec. 46. While it is admitted to be a well-settled principle that the legislature has the same unlimited power in regard to legislation which resides in the British parliament, except where it is restrained either by the state or federal constitutions, still it is equally true that these constitutional limitations are not confined to express inhibitions, for there are but few positive restraints upon the legislative power contained in the constitution. The third article, or 'bill of rights' lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular; and there are scattered through the instrument some other express provisions in restraint of legislative authority. But the affirmative prescriptions and general arrangements of the constitution are far more fruitful of restraints upon the legislative power. Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, and the erection of the principal courts of justice, 305 create implied limitations upon the law-making authority, as strong as though a negative was expressed in each instance: Cooley's Constitutional Limitations, 87; *People v. Draper*, 15 N. Y. 543. If the people had not made the provision above quoted a part of the constitution, the legislature would, so far as that instrument is concerned, have had plenary and unrestricted authority to deal with liquors in any manner it chose to do. But the people, by declaring that 'laws may be passed regulating or prohibiting the sale of intoxicating liquors,' according to the principles we have announced, imposed a restraint upon this plenary power. By granting an express authority to the legislature to regulate or prohibit the sale, there is an im-

plied inhibition to the exercise of any authority in respect to that subject which is not embraced in the grant. This rule is simply an application of the old maxim, 'Expressio unius est exclusio alterius,' which Lord Bacon concisely explains by saying: 'As exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated.' The express power here given to regulate or prohibit the sale of liquors, unless it was intended to limit the legislative authority, would render this provision of the constitution wholly nugatory and useless, because, as we have seen, without this provision the legislature would have had plenary power over the whole subject. It could not only have legislated in respect to the prohibition and sale of liquors, but in all other respects. It seems to me, therefore, that the purpose and effect of this constitutional provision was and is to restrict and limit the legislative authority to the powers expressly granted therein—that is, to the power to regulate or prohibit the sale of liquors; and consequently a legislative act not within the legitimate scope of this express grant, unless it is a fair and reasonable exercise of the police power, must be held unconstitutional and void."

We entirely concur with the principles enunciated in the foregoing opinion, and their application to the question in this case is obvious; and we accordingly hold the attempt of the legislature to make the keeping of liquor by one citizen for another, in a local option territory, whether in a house, tent, or anywhere else, and whether for a consideration or without a consideration, a crime, or the attempt on the part of the legislature to make it criminal for a person who may be the owner or proprietor of any building, et cetera, in a local option territory, to solicit or take an order from another person for intoxicating liquors, to be sent or delivered to the proprietor or owner of such house for the person giving such order, to be without authority of law, as violative of the citizen's fundamental right to use his own property as he pleases, not injuring another person; and that it is not competent for the legislature, under its power of police regulation, to impair the legal ownership and holding of one's property, either by himself or by another person.

We further hold that the act in question, applicable alone to local option territory, is violative of the express provisions of our constitution on the subject. If this law could be enforced in such local option territory, ³⁰⁶ then a minister or any member of any of the various churches who should hold or keep

wine at his residence or any house under his control, for the purpose of being used by the members of his church in the administration of the Lord's Supper, would be guilty of keeping a cold storage, for he would come under the terms of the law which inhibits the keeping of intoxicating liquors for others. This illustration will serve to show the futility of legislation to hamper or prevent the use or ownership of one's property for a purpose that is not inhibited by the constitutional provision on the subject. That provision inhibits the sale only and was evidently intended by the people to mark the limitation of power of the legislature on that subject. The people, in saying that a sale of intoxicating liquors might be prohibited, deny to the legislature the power to otherwise interfere with its use; and the cold storage act was an attempted interference with the use of intoxicating liquors in local option territory, not authorized or warranted by the constitution, and we accordingly hold it illegal and void, and it is therefore ordered that the relator be discharged.

Hurt, presiding judge, absent.

STATUTES—TITLE OF ACT—CONSTITUTIONALITY.—An act is unconstitutional and void if its title is not broad enough to include the subject matter of the legislation: *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492. See the monographic note to *Bobel v. People*, 64 Am. St. Rep. 70.

CONSTITUTIONAL LAW—POLICE POWER.—The legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but it must appear to the court, when such regulation is called in question, that there is a clear and real connection between the assumed purpose of the law and its actual provisions: *Chicago etc. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557. The courts can say whether the police power has been properly exercised by the legislature: *People v. Warden*, 157 N. Y. 116, 68 Am. St. Rep. 763; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609.

INTOXICATING LIQUORS—LOCAL OPTION.—One indicted for selling intoxicating liquor in violation of a local option law in force in a certain county, by furnishing to others and forwarding to wholesalers in another county blank orders for liquor, directing it to be shipped in the care of the defendant, who received and delivered the liquor to the persons thus ordering it, who pay him therefore, is not guilty if the liquor is shipped to him as the agent of those who order it, or at their request: *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406.

CONSTITUTIONAL LAW—LOCAL OPTION.—Wherever a local option law has been adopted in accordance with a constitutional provision, and been put in force, it operates to repeal all laws and parts of laws in conflict with it, within the limits of the locality in which it has been adopted; and a general law imposing an occupation tax on retail liquor dealers is not in force in localities where the local option law has been adopted: Extended note to *Commonwealth v. Kimball*, 35 Am. Dec. 338.

JONES v. STATE.

[38 TEXAS CRIMINAL REPORTS, 364.]

LIBEL.—RECOGNIZANCE ON APPEAL which recites that the defendant "stands charged with the offense of libel," is sufficient.

LIBEL OF A CLASS.—It is a violation of the Texas statute to libel any sect, company, or class of persons without naming any person in particular who may belong to such class.

LIBEL OF A CLASS.—A publication charging the street-car conductors of a certain city with being pimps, and that they would sell the virtue of their sisters for a drink, is libelous *per se*.

W. H. Smith, for the appellant.

M. Trice, assistant attorney-general, for the state.

366 DAVIDSON, J. Appellant was convicted of libel. The assistant attorney general moves to dismiss the appeal, because the recognizance fails to recite an offense known to the law. Said recognizance recites that the defendant "stands charged with the offense of libel." This is the only recitation in said obligation of the offense. None of the constituent elements are set out or attempted to be set out. We think that the recognizance is sufficient. Libel is defined to be an offense by the statutes, and is an offense *eo nomine*, as theft, murder, slander, et cetera. The motion to dismiss the appeal is overruled.

Appellant filed his motion in arrest of judgment, because the indictment is fatally defective, in that the published statement alleged to be libelous fails to convey the idea that the persons referred to had been guilty of a penal offense, or that they had been guilty of some act or omission which, though not penal, was disgraceful to them as members of society, the natural consequence of which was to bring them into contempt among honorable persons; or that they had some moral vice, or physical or mental defect or disease, which rendered them unfit for intercourse with respectable society, and such as would cause them to be generally avoided; or that they were notoriously of bad or infamous character. His second contention is, that the printed and published matter could be held to refer to but one person, to wit, the conductor causing the injury to a colored woman on East Avenue L car, and the indictment fails to designate by name who that conductor was; and he generally urges that the published matter is not libelous. Omitting the formal parts of the indictment, it charges that "defendant and W. H. Noble, on the 14th of November, 1896, in the county of

Galveston, in the state of Texas, with force and arms, then and there, with intent to injure A. S. Spurgeon" and others, setting them out by name, "did unlawfully and maliciously make, write, print, publish, sell, and circulate a malicious statement of and concerning the said A. S. Spurgeon" and others mentioned, "and affecting the reputation of the said A. S. Spurgeon" and others mentioned, "who were then and there conductors employed by the Galveston City Railroad Company, on the various lines in the city of Galveston, Texas, which malicious statement was of the tenor following, to wit: 'Irish Snides. It is really disgusting, to say the least, for one to take notice and see how the Irish snides employed by the street-car company (meaning the Galveston City Railroad Company) as conductors on the various lines of this city (meaning the city of Galveston) discriminate. With a few exceptions, these cowboys, escaped lunatics, and imported lords have a way of their own, and discriminate with a vim. These whelps seem to forget that they are public servants, and treat our ³⁶⁷ best colored ladies with a contempt that could only be found in a Yale chump. Some few nights ago, a colored lady, while dismounting from an East L car, was thrown to the ground by the mangy ape that poses as conductor ringing the bell before she was off the step. And the lousy little puppy, that scarcely speaks English, said to a white gentleman, that spoke of the danger of such proceedings, that she was a 'she coon.' Has it come to this? Such pimps (meaning one who provides the means and opportunities for libidinous gratification; that is to say, a procurer for the lusts of others) as this, men so low that they would willingly sell the virtue of their sister for a drink, the descendants of Oscar Wilde (meaning that they commit the crime of sodomy), greasy curs, foul-smelling scavengers, are imported to this country to insult and humiliate the people that help to make these enterprises—that build up and support these public affairs. We coons! Some of the best families of America have raised coons. I expect that foreign whelp is a coon, but the woman in question is a colored lady. Perhaps I am a coon, but I would not give one drop of my 'cooney' blood for a barrel of the 'blud' of such 'bludy' Irish snides. It's time that the car company should right these wrongs, and employ only respectable, intelligent men, that will do justice to all alike. We pay a nickel, and we demand a nickel's worth. There is too many intelligent men in this country to import such beastly bastards to insult the people here.'" It will be seen by this indictment that all of the parties named in

the alleged libelous matter are alleged to be conductors of the Galveston City Railroad Company.

Taking appellant's grounds of his motion out of the order in which he places them, we notice that ground of said motion first which alleges the indictment is insufficient, because it only refers to one conductor causing the injury to a colored woman, et cetera, and fails to designate by name that conductor. By reference to the libelous matter published, it will be seen that the first sentence in said publication refers to the conductors on the various street-cars of this city (meaning the city of Galveston) as a class. The libelous matter makes no exception among the conductors, but includes all of them. This has been held sufficient, without designating the names; and we hold this to be sufficient designation of every conductor in the service of said railroad company at the time of said publication. It therefore would be a violation of our statute to libel any sect, company, or class of men without naming any person in particular who may belong to said class: See 13 Am. & Eng. Ency. of Law, 499, and notes; 2 McClain's Criminal Law, sec. 1044.

In reply to appellant's contention that the indictment fails to charge said conductors, either directly or by innuendo, with an offense against the laws, or with some act or omission which, though not a penal offense, is disgraceful to said conductors as members of society, or the natural consequence of which is to bring them into contempt among honorable persons, or that they have some moral vice or physical or mental defect or disease which renders them unfit for intercourse with respectable society, and such as would cause them to be generally avoided, or that ³⁰⁸ they are of notoriously bad or infamous character, we have this to say: That the first allegation in the indictment, to wit, that one of these conductors caused a colored lady to be thrown to the ground while dismounting from a street-car, imputed an assault to one of said conductors belonging to the class charged in the indictment, but does not name him. But concede that we should be in error as to the effect of this allegation; unquestionably the charge that said conductors were pimps, with the innuendo following the same, is such a charge as imputed some act, which, though not a penal offense, was disgraceful to said conductors as members of society, and the natural consequence of which was to bring them into contempt among honorable persons. So of that portion of said publication which charged that said conductors were so low that they would will-

ingly sell the virtue of their sister for a drink. These charges attributed to said conductors that they were of notoriously bad or infamous character; and, as the prosecution in this case was under all of said allegations, if the proof sustained anyone, it was sufficient. It will be further noticed by reference to the allegations in the indictment that there are innuendo averments contained therein sufficiently explanatory of said statements in said publication. But, if there had not been, we hold that they were sufficient in and of themselves to constitute libel without innuendoes. The statements in the publication were so plain and unmistakable in their meaning that no intelligent person could fail to understand and comprehend what was intended by them: *More v. Bennett*, 48 N. Y. 472; 2 *McClain's Criminal Law*, sec. 1043, and authorities cited in note 2.

In regard to the remaining question, that the publication is not libelous, under the views herein expressed, it will be seen that such contention is without merit. We think the indictment is sufficient, and the judgment is affirmed.

Libel or Slander of a Class or Number of Persons.

In order to maintain an action for libel or slander, the defamatory words must refer to some ascertained or ascertainable person, and such person must be the plaintiff. If the words used do not, in fact, contain any reflection on any particular individual, no averment or innuendo can make them defamatory: *Harvey v. Coffin*, 5 Blackf. 566; *Petsch v. Dispatch Printing Co.*, 40 Minn. 291; *Miller v. Maxwell*, 16 Wend. 9; *Brashear v. Shepherd*, Sneed. (Ky.) 249; *Baldwin v. Hildreth*, 14 Gray, 221. Thus in an action for libel by a grand jury's report, where the only evidence to show that plaintiff was one of the majority of the board therein referred to is an indictment brought in by the grand jury at the same time against the plaintiff and other members of the board of police commissioners, charging them and other persons with having combined to obstruct the laws and to remove a chief of police, is not sufficient to show that he was the person intended by the grand jury's report, which alleges corruption on the part of a majority of such board, but in which the removal of the chief of police was but incidentally mentioned: *Caruth v. Raicheson*, 96 Mo. 186.

If an article in a newspaper is libelous in reflecting on a class of persons, one of that class, in order to maintain an action, must show that he is specially included in such class. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual": *Eastwood v. Holmes*, 1 Fost. & F. 347.

Though the words used may at first appear to apply only to a class, and not to be specially defamatory of any particular individual or member of such class, yet an action may be maintained

by any person of that class who can satisfy the court that the words used refer especially to himself, but the words must be capable of bearing such special application, and there must be an averment that the words were spoken of the plaintiff and he must also aver extraneous facts, if any, showing that he was the person specially referred to. "The principle is undoubtedly correct that where libelous or slanderous matter is published against a class or aggregate body of persons, an individual member, not specially mentioned or included or designated, cannot maintain an action, for this, among other reasons, that the body may act very corruptly or disgracefully, yet the individual may have been in the minority and may have opposed the measures alluded to. But where many individuals are severally included in the same attack, whether by the language of the satirist or the pencil of the caricaturist, the plaintiff is not the less entitled to redress, because others are injured by the same act. Then the question is, whether, on the whole, the declaration does aver with sufficient certainty, that the plaintiff is individually held up to contempt": *Ellis v. Kimball*, 16 Pick. 132-135. If a declaration alleges that the defendant published of and concerning the plaintiff and of a certain court martial of which he was a member, a defamatory libel and caricature, consisting of a certain picture and representation of such court martial, and of the plaintiff, in which he is pointed out as a member thereof by position and certain grotesque resemblances, and is represented and exhibited in an awkward and ludicrous light, posture, and position, it avers with sufficient certainty that plaintiff was specially libelled and also sets forth the libel with sufficient certainty: *Ellis v. Kimball*, 16 Pick. 132.

It is a libel to write of a Roman Catholic nunnery that it is a brothel of prostitution, for this is an aspersion on the character of the nuns in general, though none are singled out by name, and any nun belonging to that particular nunnery could maintain an action therefor: *Gathercole's case*, 2 Lew. C. C. 237. An article published in a newspaper calling policemen hogs and blood-sucking police officers, who insist on sitting on juries to the neglect of their duties and to cheat honorable citizens out of their jury fees, and adding that this has no reference to the chief of police, because he is beneath notice, is an actionable libel as to him and to either of such policemen: *Smith v. Utley*, 92 Wis. 133. A charge by one made to a father that "your children are thieves, and I can prove it" is sufficiently definite to enable either of such children to maintain an action for slander: *Gidney v. Blake*, 11 Johns. 54; and to constitute a criminal libel it is not necessary that the alleged libelous article reflect upon the conduct of any particular person, and if it is directed against a family it is libelous: *State v. Brady*, 44 Kan. 435, 21 Am. St. Rep. 296. It has been held in New York, erroneously, no doubt, that a civil action for libel does not lie by an officer of a regiment, for a publication reflecting upon the officers of the regiment generally, without averring special damage: *Sumner v. Buel*, 12 Johns. 475. This case was questioned in *Ryckman v. Delaven*,

25 Wend. 186, where it was held that an action of libel may be maintained by an individual for an injury to his business resulting from a libelous publication, although it affects the business of others engaged in the same calling, unless it is manifest from the face of the publication that the charges made were intended against a class of society, a particular profession, or order or body of men, and cannot by possibility import a personal application tending to private injury. This case intimates, however, that if the libel is against a class without special damage to any one of such class, the proceeding must be by criminal libel, and not by private suit. Mr. Chancellor Walworth, in delivering the opinion of the court, said: "There are many cases in the books where the writers and publishers of defamatory charges reflecting upon the conduct of particular classes, or bodies of individuals, have been proceeded against by indictment or information, although no particular one was named or designated therein to whom the charge had a personal application. All those cases, however, whether the libel is upon an organized body of men, as a legislature, a court of justice, a church, or a company of soldiers, or upon a particular class of individuals, proceed upon the ground that the charge is a misdemeanor, although it has no personal application to the individual or the body or class libeled, because it tends to excite the angry passions of the community, either in favor or against the body or class in reference to the conduct of which the charge is made, or because it tends to impair the confidence of the people in their government or in the administration of the laws": *Ryckman v. Delaven*, 25 Wend. 196; following *White v. Delaven*, 17 Wend. 49, wherein it was held that an action for libel does not lie for a publication alleged to affect the individual character of persons and the trade and business carried on by them, if on its face it does not point at the individuals named otherwise than that they pursue a particular trade or business in a certain section of the city. A publication affecting a class of persons does not entitle an individual of that class to sustain an action for the publication. We apprehend that the true rule is that, although the libelous publication is directed against a particular class of persons or a group, yet any one of that class or group may maintain an action upon showing that the words apply especially to him. "Even where the words may at first sight appear only to apply to the subordinate engineers as a class, and not to be specially defamatory of any particular one of them, still, if the plaintiff can satisfy the jury that they refer especially to him, he is authorized to maintain the action: *Hardy v. Williamson*, 86 Ga. 551, 22 Am. St. Rep. 479.

If several are included in the same libel, they may each maintain a separate action for the injury: *Smart v. Blanchard*, 42 N. H. 137. Thus, where a suit was pending against the plaintiff and sixteen others, and, in a discourse concerning the suit, the defendant said, "These defendants helped to murder H. F.," and it was held that each of the seventeen defendants was entitled to maintain his separate action for slander: *Foxcroft v. Lacy*, Hob. 89. The publication

of a statement that persons employed in a certain department "have been dismissed for alleged thefts of leather belonging to the department, and that the rascals ought to feel thankful for getting off without more severe punishment," is libelous as to each of the persons so discharged: *Dwyer v. Fireman's Journal Co.*, 11 Daly, 248; *Ryer v. Fireman's Journal Co.*, 11 Daly, 251.

The words, "Those people upstairs keep a whore house," are actionable per se, and where the complaint alleges that such words were spoken concerning the plaintiff, such allegation is sufficient to connect the plaintiff with the words "the people upstairs," and will admit proof that plaintiff was one of the people referred to: *Cook v. Rief*, 20 Jones & S. 302, 52 N. Y. Sup. Ct. 302. If words amounting to a libel against a group of persons, as the "city hall ring," leave it uncertain as to the application thereof to the plaintiff, such application may be shown by proof of extrinsic facts which need not be alleged in the complaint: *Petsch v. Dispatch Printing Co.*, 40 Minn. 291. To the same effect, *Thibault v. Sessions*, 101 Mich. 279. A publication, if false, of a list of persons who, though able, will not pay their debts, is libelous, and an action therefor may be maintained by anyone of the persons named: *Nettles v. Somervell*, 6 Tex. Civ. App. 627. An article is libelous per se which, being published in a newspaper, of certain persons, including the plaintiff, charges that, with contracted fanaticism, alleged ladies have perambulated the streets to prevent such newspaper from being purchased; that these ladies brazenly lowered themselves to a level which they would blush, if they possessed modesty, to see described in type; that the time used by them could be more profitably employed in scrubbing their filthy kitchens; that women like them have little Christianity except that which they flaunt on dress parade; that they are usually indifferently good mothers, wives and daughters, and are intermeddlers who accomplish nothing, and neglect the duties God has created for them: *Street v. Johnson*, 80 Wis. 455, 27 Am. St. Rep. 42.

PAYNE v. STATE.

[38 TEXAS CRIMINAL REPORTS, 491.]

RAPE—FRAUD IN PERSONATING HUSBAND—INDICTMENT.—An indictment which charges a rape by fraud in personating the husband must allege that the injured female is a married woman, and not the wife of the defendant; and while it is not necessary to allege the name of the husband, it is the better practice to do so.

RAPE—FRAUD IN PERSONATING HUSBAND.—In order to constitute the crime of rape by fraud in personating the husband the defendant must resort to some device or stratagem, some artifice or trick, intending to deceive the prosecutrix and make her believe that he is her husband, and the effect of such stratagem

must also be to deceive and impose on her and make her believe that he is her husband at the time the act is committed, and by this means gain her consent to the copulation.

RAPE—BY FORCE—PERSONATING HUSBAND.—If a man begins the act of copulation with a married woman while she is asleep, and upon awakening she makes no resistance, believing him to be her husband, the crime may be rape by force, but not by fraud.

J. E. Thomas, for the appellant.

M. Trice, assistant attorney general, for the state.

496 HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal. The charging part of the indictment is as follows: "That defendant did then and there by force, threats, and fraud, and without the consent of the said Jessie Winn, ravish and have carnal knowledge of the said Jessie Winn, the said Jessie Winn not being then and there the wife of the said Bunyon Payne," et cetera.

The evidence showed that on the night of the alleged offense there was a party at the house of one H. B. Payne, the father of the appellant. The party broke up some time after midnight, and the prosecutrix, Mrs. Jessie Winn, and her husband, stayed overnight at said house. A bed was made down for them in the main room of the house, and in the same room, on the other side from the bed of the prosecutrix and her husband, Dan Loftin and his two brothers, and the defendant and his two brothers, slept on pallets. In the kitchen, adjoining this room, Mrs. McGary and her husband slept. Some time in the night, just about daylight, Mrs. Jessie Winn awoke, and found defendant on top of her. She did not then know who he was. He had her clothes up. She tried to get him to get off, but he would not do so. He had intercourse with her. Had already commenced intercourse with her when she waked up. At the time she thought it was her husband, and called him "George." That she did not do anything but talk to him, and try to get him to get off. That at the time she was unwell with her menses, but he did not get off until he got through. While he was in the act, and when she first waked up, she put her arms around his neck and kissed him, and said, "George, what do you mean?" That when he got off of her he crawled from the bed of the prosecutrix to his pallet on his hands and knees, and she then knew **497** it was not her husband, but recognized him as Bunyon Payne. She immediately aroused her husband,

and told him what defendant had done. There was also other testimony in the case; and, among other witnesses, Mrs. G. G. McGary testified to seeing defendant sitting at the head of her bed during the night, sometime before the alleged rape, after she had retired.

Appellant's first bill of exceptions is with regard to the admission of evidence that the prosecutrix was a married woman, and the wife of G. W. Winn. This was objected to, on the ground that the indictment did not allege that the injured female was a married woman. This brings in question the validity of the indictment in this case. The conviction was no doubt procured under the allegation of fraud, which, by our statute, is defined to mean "the use of some stratagem, by which the woman is induced to believe the offender is her husband; or in administering, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance": See Pen. Code, 1895, art. 636. We have examined the authorities as to the form of an indictment where the rape was committed by a false personation of the husband, but we have been unable to find a case where the question of the indictment has been treated. In England, as in this country, it appears that rape is a statutory offense, and we understand that, under an ordinary indictment in England for rape by force and without the consent of the alleged injured female, the proof can be made for rape by procuring the intercourse by a false personation of the husband of the female: See *Regina v. Young*, 38 L. T., N. S., 540; *Wharton's Criminal Law*, sec. 561, and notes. In this state the statute above quoted was evidently passed to cover this character of offense; that is, where the alleged rape was committed by fraud. And in *Franklin v. State*, 34 Tex. Crim. Rep. 203, we held that the indictment for an attempt to commit a rape need not set out the particular kind of fraud, whether by personating the husband or administering some substance to the female; and that the general charge of an attempt to rape by fraud is sufficient, and furnishes the basis for proof of either means stated in the statute. We also held in that case that, where the indictment alleged that the injured female was a married woman, this would authorize proof of the name of her husband, though his name was not set out in the indictment. This is as far as we feel authorized to go. We hold that an indictment, as in this case, which charges a

rape by fraud in personating the husband, in order to be sufficient, must allege that the injured female is a married woman, and not the wife of the defendant. While it is not necessary to allege the name of the husband, still this allegation would be the better practice, and it would be no means vitiate the indictment. The allegations of the indictment being defective in this respect, we hold it insufficient to sustain a conviction for rape by fraud in personating the husband.

⁴⁹⁸ The question is also presented to us whether or not the facts of this case show such false personation of the husband as to constitute a rape; that is, it is insisted that the intercourse was accomplished without any stratagem or deception on the part of the appellant to induce the prosecutrix to believe that he was her husband. It is a feature of our constitution, and a cardinal principle in all our criminal law, that no one can be punished unless under a written law of this state in which the offense has been defined. Now, the definition above quoted from the statutes, where the prosecution is based on fraud, makes it essential that the defendant use some stratagem by which the woman is induced to believe that the offender is her husband. A "stratagem" is defined to be "any artifice; a trick by which some advantage is intended to be obtained": See Century Dictionary. Now, according to our statute, it becomes absolutely necessary, in order to constitute this offense, that the defendant resort to some device or stratagem, some artifice or trick, intending to deceive the prosecutrix, and make her believe that he is her husband; and not only so, but the effect of his stratagem must be to deceive and impose on her, and make her believe that he is her husband at the time the act was committed, and by this means gain her consent to the copulation. Applying this rule to the facts as they appear in the record, we find that the prosecutrix testifies that, when she first awoke, the defendant had already penetrated her person, and was then in the act of copulating with her. She being asleep at the time, it was impossible, no matter what his acts may have been in the premises, that they should have operated upon her mind so as to induce her to consent under the belief that he was her husband. And, moreover, the record fails to disclose that he used any stratagem; his only action being to go to her bed, get on top of her, and begin the act of copulation while she was asleep. What was done after the act of copulation began, even if it could be conceded that he then resorted to some stratagem to continue

the operation, would not constitute this offense; but the record fails to disclose, even during the continuance of the act, that he resorted to any artifice or trick to induce her to believe that he was her husband. In *Mooney v. State*, 29 Tex. Crim. App. 257, this court held that the act of copulation by a defendant with the wife of another person, while she was asleep, she being incapable of consenting at the time, was rape by force; and this is in accord with a number of authorities. But this was not rape by fraud: See *Regina v. Young*, 38 L. T., N. S., 540, and *Wharton's Criminal Law*, sec. 561, and notes. In *Ledbetter v. State*, 33 Tex. Crim. Rep. 400, the conviction in that case for rape by falsely personating her husband was upheld on the ground that the evidence was sufficient to show that the appellant by his language, as well as conduct, induced the injured female to believe that he was her husband. In that case the evidence showed that she was awake at the time, and consented to the act, under the belief that appellant was her husband. But, as stated above, such is not the testimony in this case; and, in our opinion, the evidence is not sufficient to authorize a conviction of rape by fraud. The court in his charge submitted rape by fraud ⁴⁹⁹ alone. As to the testimony of Mrs. McGary, we are inclined to believe that same was not admissible, but, as limited by the court, perhaps it was not calculated to injure the appellant so as to authorize a reversal of the case.

For the error discussed the judgment is reversed and the cause remanded.

RAPE—FRAUD IN PERSONATING HUSBAND.—Cohabitation procured by means of the fraudulent personation of a female's husband does not amount to the crime of rape; there is neither actual nor constructive force: *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113. See, however, as holding that consent obtained by fraud is no consent, and does not deprive the offense of the character of rape, the note to *State v. Murphy*, 41 Am. Dec. 84.

RAPE.—AN INDICTMENT for rape need not allege that the woman ravished was not the wife of the defendant: *Commonwealth v. Fogerty*, 8 Gray, 489, 60 Am. Dec. 264.

DORSEY v. STATE.

[38 TEXAS CRIMINAL REPORTS, 527.]

FOODS—ADULTERATION OF.—An indictment charging the manufacture and offer for sale of an adulterated article of food must allege the article with which it is adulterated, under a statute which makes any article of food criminally adulterated “if any substance or substances has or have been mixed with it so as to reduce or lower or injuriously affect its quality or strength, or if any inferior or cheaper substance or substances have been substituted wholly or in part for the article.”

FOODS—ADULTERATION OF—POWER TO PROHIBIT.—Under the police power of the state, the legislature may legally pass an act stating in distinct terms, as to any article of food or drink, that if any person shall adulterate such article, naming it, with any other substance, without labeling it, he shall be guilty of an offense; but it is not competent to make criminal the mixing or mingling of articles of food which are wholesome and nutritious and absolutely prohibit the sale thereof.

FOODS—ADULTERATION OF—POWER TO REGULATE.—A statute providing that, if certain named wholesome and nutritious articles of food are mixed or intermingled, the product must be labeled, showing the component elements thereof, and punishing a failure to so label, is valid, but a statute which embraces all articles of food or drink, without naming any, and makes the mixture of any articles of food, however nutritious, without labeling the product, an offense, is too general in its terms and cannot be enforced.

Martin & Flanary and G. A. McCall, for the appellant.

W. W. Walling, and M. Trice, assistant attorney general, for the state.

530 HENDERSON, J. Appellant was convicted of knowingly and fraudulently adulterating an article of food, and his punishment assessed at a fine of one hundred dollars; hence this appeal.

As appellant made a motion to quash the information, and assigns the refusal of the court to quash the same as error, we will set out the charging part of the information, to wit: “That H. B. Dorsey did then and there knowingly and fraudulently manufacture, offer for sale, and sell a certain article of food, to wit, flour, which was then and there known by him, the said H. B. Dorsey, to be adulterated, contrary,” et cetera. There are two statutes pertaining to this subject, under either of which the indictment may have been drawn. The first is article 427 of the Penal Code of **531** 1895, which provides: “If any person shall fraudulently adulterate, for the purpose of sale, any substance intended for food, . . . with any substance injurious

to health, he shall be punished by a fine not less than fifty dollars nor more than five hundred dollars." Article 430 provides: "No person shall within this state manufacture, offer for sale, or sell any article of food, which is by him known to be adulterated within the meaning of this law"; and the punishment assessed is a fine not exceeding one hundred dollars. Article 432 of the Penal Code undertakes to more specifically define the meaning of the term "adulteration," and in what it consists. As to foods or drinks, the following are the provisions necessary to be quoted, so far as applicable to this case: "1. If any substance or substances has or have been mixed with it so as to reduce or lower or injuriously affect its quality or strength; 2. If any inferior or cheaper substance or substances have been substituted wholly or in part for the article"; "6. If it be colored or coated or polished or powdered, whereby damage is concealed, or it is made to appear better than it really is, or of greater value." Appended to this article is the following: "Provided, that the state health officer may, with the approval of the governor, from time to time declare certain articles or preparations to be exempt from the provisions of this law; and provided, further, that the provision of this act shall not apply to mixtures or compounds recognized as ordinary articles of food, provided the same are not injurious to health, and that the articles are distinctly labeled as a mixture, stating the components of the mixture." The proof in this case shows (which was admitted by appellant) that the adulteration was of flour; that is, flour and meal were mixed or mingled together by a bolting process which was in operation in defendant's flouring mill. The mixture or compound contained ninety per cent of flour and ten per cent of corn meal.

The contention of the defendant as to the indictment is that it should have stated how the adulteration was made; that is, the contention is, that it was necessary to prove an admixture or adulteration of the flour, and to show how the same was adulterated, by evidence, and that the indictment should have contained the allegations, so as to put appellant on notice of what he was charged to answer. For instance, in this case it is insisted that the indictment should have alleged that the flour was adulterated with a certain portion of corn meal, and that said meal was a substance such as to reduce or lower or injuriously affect the quality of the flour, or that said flour was adulterated with meal, which was an inferior or cheaper substance than the

flour with which it was mixed. It occurs to us that this contention is sound. There are a number of articles or substances which might be intermingled with flour so as to reduce or lower or injuriously affect its quality or strength, or which are of an inferior or cheaper character; and under our system of criminal pleading the appellant should have been charged with the particular substance with which the article in question was adulterated, so that he might be prepared to meet the state's case.

⁵³² We take it that the indictment in question was brought under article 430, and not under article 427, inasmuch as there is no allegation, nor does the proof indicate, that the meal shown to have been mixed with the flour was injurious to health. In fact, the contrary appears. It further appears from the evidence in the case that both compounds which are claimed to constitute the adulteration are recognized as ordinary articles of food, and not injurious to health. In such case, under the provisions of the law, if such articles are mixed together, and are distinctly labeled as a mixture, the person manufacturing such article is not indictable. It would, therefore, seem to follow that the indictment, to be good under this article, should negative the fact that such substances or articles of food, when combined so as to produce a wholesome article of food, were properly labeled. Of course, it is competent, under the police power of the state, for the legislature to pass an act stating in distinct terms, as to any article of food or drink, that if any person, et cetera, shall adulterate such article (naming it) with any other substance, without labeling same, such person shall be guilty of an offense. We understand this to be a rule laid down by the authorities. Some of the legislation is based on the adulteration of articles of food or drink which are unwholesome or injurious, and this appears to be provided against in article 427 of our statute. Other legislation is aimed at the prevention of frauds on the public, to prevent palming off on them an article of food other or different from that which they are led to believe they are purchasing; and as to the latter, the authorities appear to hold that it is competent for the legislature to prohibit the mixture or compound altogether, though it may not be injurious or unwholesome: See *Powell v. Commonwealth*, 114 Pa. St. 265, 60 Am. Rep. 350, and authorities there cited; *Waterbury v. Newton*, 50 N. J. L. 534; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429. We would not be understood as indorsing the doctrine laid down in the above authorities. The courts have gone

to great length in upholding legislation under the police power. In some decisions it has been so magnified as to be regarded as almost omnipotent. We do not agree to the doctrine that under this power, or any other, the legislature can make criminal the mixture or mingling of articles of food which are wholesome and nutritious, and prohibit the sale thereof. We can add nothing to the dissenting opinion of Judge Gordon in the case of *Powell v. Commonwealth*, 114 Pa. St. 265, 60 Am. Rep. 350. We do agree to this proposition, that the legislature, when such articles (namely, articles of wholesome and nutritious food) are mixed and intermingled, can require that the product be labeled, showing the component elements thereof, and punish a failure to so label. We further hold that the present act of the legislature on the subject is too general in its terms. It simply embraces all articles of food or drink, without naming any, and makes the mixture of any articles of food, however nutritious, without labeling the product, an offense. A great many articles of food are mixed and combined together, and such combinations are not only harmless, but are healthy, as articles of food; and to require all such articles to be labeled, ⁵³³ so as to show the constituent elements composing the same, it occurs to us, is extremely onerous legislation. We hold that an act on this subject, to be enforced, should name the particular article of food, the adulteration of which is prohibited by the legislature, and which is required to be labeled. In all the cases on the subject which have come to our notice, the legislature appears to have directed the law to some particular article of food or drink. For instance, in the *Powell* case, *supra*, the act was for the purpose of prohibiting the manufacture of oleomargarine. Now, as bearing on the subject before us, we hold that it would be entirely competent for the legislature, by an act, to prohibit the sale, et cetera, of flour mixed with meal, or any other wholesome article, without properly labeling the product of such combination. They have not done this. The prosecution is attempted to be maintained under the general act to prohibit the intermixing of all foods. We do not believe that it was competent for the legislature to do this.

The judgment is reversed, and the prosecution ordered dismissed.

POLICE POWER—ADULTERATION OF FOODS.—No man has a constitutional right to keep secret the composition of substances which he sells to the public as articles of food. Therefore, a statute

requiring the seller of "lard substitutes" to give notice of that fact to the purchaser, by labeling the article with a quantitative analysis of its ingredients, does not deprive the seller of his property without due process of law, but is a valid exercise of the police power: *State v. Aslesen*, 50 Minn. 5, 36 Am. St. Rep. 620. A statute prohibiting and making criminal the sale of oleomargarine unless it has been colored pink is constitutional, though applicable to that manufactured without, as well as within, the state. Such a statute has for its object the prevention of fraud on the public, and is therefore within the police power of the state: *State v. Myers*, 42 W. Va. 822, 57 Am. St. Rep. 887; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, and note; monographic note to *Butler v. Chambers*, 1 Am. St. Rep. 644.

CASES
IN THE
SUPREME COURT
OF
UTAH.

MURPHY v. MOYLE.

[17 UTAH, 113.]

MARRIAGE AND DIVORCE—ALIMONY AFTER DEATH OF HUSBAND.—Whether a divorced wife and minor children, or any of them, are entitled to have the payment of alimony or money for their support continue after the death of the divorced husband depends on the nature and terms of the decree of divorce.

MARRIAGE AND DIVORCE—ALIMONY AFTER DEATH OF HUSBAND.—A decree in a divorce suit granting an absolute divorce and providing that the mother shall have the care and custody of the minor children, and the father shall pay a certain sum monthly toward their support during their minority, is not discharged nor annulled by the death of the father. Its performance may be enforced thereafter out of his estate.

MARRIAGE AND DIVORCE—ALIMONY—SECURITY.—If there is danger that a divorced husband may dispose of his property by conveyance or squander it, so that nothing will remain upon which the decree of divorce providing for alimony or the support of minor children can operate, the court may require him to furnish security for its performance.

MARRIAGE AND DIVORCE—ALIMONY—SECURITY—ENFORCEMENT OF LIEN.—If a court, in granting an absolute divorce, decrees that a husband shall pay a certain sum per month toward the support of his minor children, and makes such obligation a lien upon part of his property, it may foreclose the lien upon failure of payment, and its power to do this is not affected by the death of the father; and if the proceeds are insufficient to satisfy the claim, it may enforce payment of the balance out of the estate.

J. H. and O. H. Moyle, for the appellant.

Ferguson & Cannon, for the respondent.

116 BARTCH, J. This action was instituted by the plaintiff against the defendant, as executor of the last will and testament

of Jesse J. Murphy, deceased, and involves the sum of four hundred and forty-seven dollars, claimed by virtue of a decree, and subsequent modification thereof, made by the district court of the late territory of Utah, in an action for divorce brought by defendant's testate against the plaintiff. In that case, the defendant (plaintiff herein) filed a cross-complaint, and a decree was granted in her favor on her cross-complaint, by which the bonds of matrimony existing between the parties were dissolved, and a certain sum of money decreed to be paid monthly by the defendant therein to the plaintiff, for the support of their two minor children during their minority, and until they would be of age. To secure the payment of such sum, it was decreed to be a lien on certain property of the plaintiff in that suit. The ¹¹⁷decree was afterward so modified as to require payment of but one-half of the original sum, and this was to be for the support of the child in whose behalf this suit was brought. Since the death of the testate, payment has been refused by the executor, who also refused to allow the claim above mentioned. At the trial of this cause, the court rendered judgment in favor of the plaintiff, directing that the "defendant, as executor of the last will and testament of Jesse J. Murphy, deceased, pay to the clerk of the court, for the use of the plaintiff, the sum of four hundred and forty-seven dollars, to be paid by said clerk to the plaintiff in the following manner: The sum of two hundred and sixteen dollars to be paid as soon as received by said clerk; the sum of six dollars per month on the first day of April, 1897; the sum of six dollars per month on each succeeding month thereafter until May 15, 1900, for the care, support, and education of Clara Murphy, the minor daughter of the deceased, to be paid to plaintiff while said minor is under age, and in the care and custody of plaintiff"—and further decreed that the plaintiff had a lien on the property described in the decree, made in the divorce proceedings, and ordered the same to be sold to satisfy the lien, and the proceeds to be turned over to the clerk of the court, and that, if the proceeds were insufficient to pay the amount, the executor should pay the deficiency. Judgment was also given for costs.

The material question to be determined is whether, under the decree made in the proceedings for divorce, as afterward modified, and under the law, the court was authorized to make the decree in controversy herein. Counsel for the appellant contend that the payment of the money for the support of the

minor child could not be enforced after the death of the testate. The rule which counsel would here invoke was doubtless applicable at ¹¹⁸ common law to a divorce a mensa et thoro, which did not finally terminate the marriage relation, but merely effected a separation, without disturbing the marital rights and obligations; but it does not necessarily apply to a decree of divorce granted under the statutes of this state, which has the same effect upon the marriage relations and marital rights and obligations as a divorce a vinculo matrimonii at common law. In such case, whether or not the divorced wife and minor children, or any of them, are entitled to have the payment of alimony or money for their support continue after the death of the deceased depends on the nature and terms of the decree allowing the same. In the case at bar, the original decree of divorce, after declaring the bonds of matrimony existing between the parties dissolved, and awarding the care, custody, and control of their minor children (who are therein mentioned as Priscilla Ellen Murphy and Clara Jane Murphy) to the defendant, the plaintiff herein, respecting the matter of support for them, provides as follows: "It is further ordered, adjudged, and decreed by the court that the defendant have and receive from the plaintiff the sum of twelve dollars per month permanent alimony and support for her said minor children, the said amount to be paid to her by the plaintiff on the first day of each and every month during the minority of said children, and until they become of age, and that, as security for the payment thereof, the defendant have a lien" upon certain premises and property described in the decree. It will be noticed that by this decree the plaintiff was required to pay the sum of twelve dollars per month alimony and support for their two minor children during their minority, and there is no other limitation than their minority, and that a specific lien was placed on certain property to secure the payment of such sum. The ¹¹⁹ divorce granted was absolute, and severed all marital relations; and the children during their minority had no other recourse against their father or his estate for support than that provided in the decree, unless by the order of the court. Afterward, this decree in respect to the support of the minor children was modified as follows: "It is therefore hereby ordered, adjudged, and decreed that said former decree entered in this case, June 24, 1890, be and the same shall be, and is, modified as follows: That said defendant shall have the care and custody of the said

minor child Clara Murphy, and the said plaintiff shall pay to the said defendant, for the support and maintenance of said Clara Murphy, the sum of six dollars each month. And it is further ordered that said decree entered June 24, 1890, is hereby further modified so that the lien provided for on said three-quarters of lot 24 in block 4, and the portion of lot 3, in said Ogden City survey, county of Weber, territory of Utah, is hereby set aside and dissolved so far as modified, and shall stand for naught; and said lien is retained and continued as follows: Defendant shall still have a lien on the following portion of said lot, and that only to secure the payment of said six dollars per month for the support of said minor child." The property to be affected by the lien, and which is in this action ordered to be sold, is then described. This modified decree simply cuts off the support to one of the children, and it does not materially affect the force of the former decree as to the other. It does not in express terms require payment during minority, but the former decree does; and it will be noticed that the original decree is set aside and held for naught only "so far as modified." Therefore, construing the two decrees together, it becomes apparent that the intention was to provide for the support of the child mentioned in the modified decree during minority; and this ¹²⁰ is the manifest intention indicated by the modified decree. Were, then, these decrees, and especially the provisions thereof respecting the children, made in pursuance of law?

Section 2606 of the Comp. Laws of Utah of 1888, so far as material here, reads: "When a divorce is decreed, the court shall make such order in relation to the children and property of the parties, and the maintenance of the wife, and such portion of the children as may be awarded to her, as may be just and equitable; . . . provided, further, that when it shall appear to the court at a future time that it would be for the interest of the parties concerned that a change should be effected in regard to the formal disposal of children or distribution of property, the court shall have power to make such change as will be conducive to the best interest of all parties concerned." This statute is broad and comprehensive. Under it the court has power to make such a decree as the circumstances may warrant, and, doubtless, if there is danger of the father squandering the estate, or if, from hostility or other cause, he is likely to refuse maintenance to his wife, or support to his children awarded to

her, and thus leave the children to be supported by the mother without aid from the estate, the court may make such order respecting the property and the support and maintenance of the wife and children as is just and equitable, and such order or decree may be made to continue in force after his decease; and the court may afterward, if occasion shall require it, make such change in any decree as "will be conducive to the best interest of all parties concerned." The court may also properly require the husband to furnish security where there is danger that he will dispose of his property by conveyance or squander it, so that nothing will remain upon which the decree can operate. Testing, ¹²¹ therefore, the original and modified decrees by the terms of the statute, it is evident that they were both authorized, and created an obligation to pay and a lien on the property described in the modified decree as security for payment in accordance with the terms of the decrees, which obligation and lien continued in force after the death of the deceased, and bound his estate. Such lien was subject to foreclosure for failure to make payment of the sum stipulated at any time during the minority of the child. It could be foreclosed the same as any other lien for the purpose of enforcing payment. In *O'Hagan v. O'Hagan*, 4 Iowa, 509, with reference to a decree of divorce fixing a certain allowance as alimony to the wife for life, it was said: "This decree has the same force and validity as any other judgment, and may be collected in the same manner. It is a fixed, ascertained, and subsisting debt against him, and, upon his death, against his estate.

Nor was it improper, under the terms of the original and modified decrees, for the court in this case to decree the property to be sold, and the proceeds applied to the payment of a sum, equal in amount to that which was ordered to be paid during the minority of the child, and have the same paid to the clerk of the court, to be paid by him to the plaintiff as it becomes due. The court had the right to enforce the former decrees, and foreclose the lien upon failure of payment, and its power to do so was not affected by the death of the testate, and, if the proceeds shall be insufficient to satisfy the claim, it may enforce payment of the balance out of the estate: *Miller v. Miller*, 64 Me. 484; *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417; *Carson v. Murray*, 3 Paige, 483; *Burr v. Burr*, 7 Hill, 207; *Stratton v. Stratton*, 77 Me. 373, 52 Am. Rep. 779. The cases cited by appellant do not appear to be in point under our ¹²²

statute and the decree of divorce herein considered, and therefore we do not deem it important to review them.

We cannot sanction appellant's contention. It is unsound, as being at variance not only with the decrees of the court and the law, but also with justice, for it is the solemn duty of every husband and father to support his wife during life, and his children during their minority, suitably to their station in life, and, if he fail to do so, every principle of justice demands that they be thus supported out of his estate. This is, doubtless, what the court endeavored to do in this case, as is apparent from an examination of the several decrees. We are of the opinion that the decree in the case at bar is valid, and, as there is no reversible error in the record, the judgment must be affirmed. It is so ordered.

Zane, C. J., concurs.

Miner, J., dissents.

MARRIAGE AND DIVORCE — ALIMONY AFTER DEATH OF HUSBAND.—Where alimony is decreed in terms for the natural life of the wife, it subsists even after the defendant's death: *Stratton v. Stratton*, 77 Me. 373, 52 Am. Rep. 779. A consent decree, which provides for payment of alimony to a divorced wife "so long as she may remain sole and unmarried," is binding upon the husband during his lifetime, and upon his estate after his decease, so long as the wife remains unmarried: *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417. The right to alimony ceases on the death of the husband, and cannot afterward be avallably asserted, unless it has been before ascertained and fixed by decree: *Gaines v. Gaines*, 9 B. Mon. 295, 48 Am. Dec. 425. In an earlier case in Kentucky, however, it was held that the right to alimony continues only during the lifetime of the husband, or during the separation of the wife from him; and it is, therefore, erroneous to decree it to her for the term of her life: *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. Dec. 52.

MARRIAGE AND DIVORCE — ALIMONY — LIEN.—Alimony awarded in a divorce case may be decreed to be a lien upon the real estate of the defendant, but not upon his personal property: *Johnson v. Johnson*, 22 Colo. 20, 55 Am. St. Rep. 112, and note. See, also, *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86.

SINGER v. SALT LAKE COPPER MANUFACTURING Co.

[17 UTAH, 143.]

CORPORATIONS—MEETINGS—PRESUMPTIONS AS TO REGULARITY.—If meetings of a legally constituted board of directors have been held, and business within the scope of and pursuant to the purposes for which the corporation was organized has been transacted, the presumption is, that such meetings were regularly called, convened, and held for the transaction of such business, and the onus probandi is upon him who maintains the contrary to allege and prove that they were not so called and held.

CORPORATIONS—MEETINGS—PRESUMPTION AS TO REGULARITY.—If it appears that a special meeting of the directors of a corporation was held and that a quorum was present, it must be presumed that due notice of the meeting was given and that all steps necessary to constitute it a regular and valid meeting were taken.

CORPORATIONS—TRUST DEED—EXECUTION OF.—If a committee is authorized by the board of directors of a corporation to procure a loan for it and the officers who execute a trust deed to secure such loan are expressly authorized to do so by the board of directors and the by-laws of the corporation, the validity of the deed cannot be assailed on the ground that it is not signed by the president and secretary of the corporation.

CORPORATIONS—TRUST DEED—DIRECTOR DEALING WITH CORPORATION.—If, in the execution of a trust deed by a corporation, there is an entire absence of want of good faith, fraud and collusion and the corporation is a going concern, a stockholder or director is not prohibited from dealing with it. In such case the mere fact that a director furnished a portion of the money does not vitiate the trust deed given to secure the loan. Contracts made by a corporation with its officers are not void per se, but will be carefully scrutinized in equity and set aside, if not made in the utmost good faith.

CORPORATIONS—MEETINGS—NOTICE.—As a general rule, notice must be given in some way to all directors of the meetings of the board, where the by-laws and rules of the corporation do not provide the time and place of meeting, in order to render them valid. To this rule there are exceptions, as where such an emergency exists as justifies immediate action on the part of the board, and the giving of notice to all the members is not practicable, or where a director secretes himself in order to prevent a meeting, or is beyond the reach of notice.

CORPORATIONS—MEETINGS—WANT OF NOTICE.—A meeting of the directors of a corporation held without notice to absent directors, or the existence of such an emergency as excuses notice to them, renders the business transacted at such meeting void.

CORPORATIONS—INSOLVENCY—TRUST DEED.—The insolvency of a corporation at the time a trust deed is authorized and executed by it does not alone render the instrument void.

T. Pierce, for the appellants.

Shepard & Sanford, Williams, Van Colt & Sutherland, G. A. Smith, Marshall & Royle, J. W. Barton, Dickson, Ellis & Ellis, C. F. Loofbourov, and A. F. Sanford, for the respondents.

154 BARTCH, J. The first assignment of error which we will consider is the one respecting the holding of the court, that the first trust deed, or that executed June 1, 1894, is valid. The appellants insist that it is void, and appear to base their contention upon the grounds that the meetings of the board at which it was authorized and executed were not legally called, that the deed was not signed by the president and secretary, and that one of the beneficiaries was a director of the corporation, and participated in the meeting at Denver when the trust deed was executed. Under section 493 of 1 Mills' Annotated Statutes of Colorado, by virtue of which the Salt Lake City Copper Manufacturing Company was incorporated, and under the articles of incorporation and by-laws, there is no doubt that the board of directors had the right to hold meetings beyond the limits of the state of Colorado; and the question, therefore, as to the first point of contention, is whether the meetings at New York and Denver were lawfully convened. A careful examination of the record reveals nothing to show that either one of these meetings was convened without notice to all the directors. On the contrary, from the minutes of the New York meeting it is clear that the board met on call of the president at New York on May 23, 1894. Whether this call was made by previous order of the board, as provided in the articles of incorporation, or whether all the members were actually notified of the meeting, does not appear from the minutes. Nor is there any extrinsic evidence to show that the directors were not properly notified. It does appear that **155** four of the five members of the board were present, and participated in the meeting. So, of the Denver meeting, there is nothing to indicate that it was not a legally called meeting, of which all the directors had due and legal notice. The minutes of both meetings show the business which was transacted, and that a quorum was present. Under such circumstances, and in the absence of any evidence to show that the meetings were not lawfully convened, the court would not be justified in holding that these meetings were unlawful. Where meetings of a legally constituted board of directors have been held, and business within the scope of and pursuant to the purposes for which the corporation was organized was transacted, the presumption is, that such meetings were regularly called and held for the transaction of such business, and the onus probandi is upon him who maintains the contrary to allege and prove that they were not so called and held. "This presumption in-

cludes the presumption that the meeting of a board of directors at which a given resolution was passed was regularly convened. Thus, where the validity of an act done at a special meeting of the board of directors of a corporation is drawn in question on the ground that some of the directors were not notified to attend the meeting, the burden is on the party attacking the regularity of the proceedings to show that the directors in question were not in fact notified. If it appear that a meeting was held, and that a quorum was present, it will be presumed, in the absence of evidence to the contrary, that due notice was given, and that all steps necessary to constitute it a regular and valid meeting were taken": 3 Thompson on Corporations, sec. 3297; see, also, sec. 3926; 1 Cook on Stock and Stockholders, sec. 600; 1 Morawetz on Private Corporations, sec. 532; Wells v. Rodgers, 60 Mich. 525; Leavitt v. Oxford etc. Min. Co., 3 Utah, 265; Choateau Ins. Co. v. Holmes, 68 Mo. 601, 30 Am. Rep. 807; ¹⁵⁶ Hardin v. Iowa Ry. etc. Co., 78 Iowa, 726. And notice need not be affirmatively shown by the record: 3 Thompson on Corporations, sec. 3934; Sargent v. Webster, 13 Met. 497, 46 Am. Dec. 743; Wells v. Rodgers, 60 Mich. 525.

If, therefore, the appellants wished to attack the validity of either or both of the meetings in question, it was incumbent upon them, by proper averment in their answer, to raise the issue that the meeting or meetings were irregularly and illegally convened, because of want of notice or otherwise, and then to establish the fact by proof at the trial. The question of the legality of those meetings was one of grave importance to the plaintiff, because upon it depended the validity of the first trust deed, through which he and others claimed priority of payment over the appellants. This is especially so, owing to the insolvency of the common debtor. The plaintiff was entitled to be informed by their answer as to the true nature of the defense which his adversaries intended to make, so that he could prepare to meet it. "The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defense relied upon by the pleader, and may thus have an opportunity of meeting and defeating it, if possible, at the trial. Unless the petition or complaint, on the one hand, and the answer, on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state

their demands orally before the court at the time of the trial. The requirement, therefore, that the cause of action or the affirmative defense must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading": Pomeroy's Remedies and Remedial Rights, sec. 554; ¹⁵⁷ Walton v. Minturn, 1 Cal. 362; Green v. Palmer, 15 Cal. 412, 76 Am. Dec. 492; Campbell v. Jones, 38 Cal. 507. There appear to be no allegations in the answers of the appellants that no notice of those meetings was given to the directors, nor that they were otherwise unlawfully held. They having failed to raise such an issue by the pleadings, and to establish the same by competent evidence, the presumption, "Omnia rite acta," must be held to apply, and the meetings be regarded as in all respects regular and valid.

There is no foundation for the contention that the first trust deed was not properly executed. A committee was authorized to procure the loan, and the officers who executed the trust deed were expressly authorized by the board, and by virtue of the by-laws were proper officers, to execute the deed. Nor can the fact that the plaintiff, who was a director and interested in the loan, participated in the meeting at Denver when the trust deed was executed and delivered, avail the appellants, under the facts and circumstances disclosed. The board of directors of the corporation consisted of five members, three of whom constituted a quorum, and at the meeting held in New York there were present four directors, and it is true that plaintiff was one of them, but there was a quorum present without him. At that meeting, by unanimous action, the board authorized a committee to negotiate a loan of one hundred thousand dollars, and empowered the proper officers to execute the necessary papers therefor, including a trust deed, on the property of the company. At that time the corporation was solvent—a going concern—and pursuing the objects of its creation. The loan was ordered to be negotiated for the purpose of paying its bills and overdrafts at a bank, and to complete and put into operation its electrolytical plant and copper refinery. The committee, it appears, found it difficult to procure the ¹⁵⁸ entire sum from disinterested parties, and hence negotiated with the plaintiff and three others, who furnished the money; and at the meeting held in Denver the loan which had thus been previously authorized was perfected, by the proper officers executing and delivering the notes and trust deed. There seems to be nothing in the transaction which

is tainted with fraud or collusion. It has the appearance of a fair business dealing, made, not for the purpose of hindering or delaying creditors in the collection of their claims, or securing an advantage over creditors, or defrauding them, but for the purpose of discharging honest obligations, and continuing the business of the corporation. Under these circumstances, the mere fact that a director furnished a portion of the money borrowed does not have the effect of vitiating the trust deed given to secure the loan. Nor would this trust deed be void, under the circumstances surrounding its execution, even if it were conceded that the plaintiff, being the director who furnished a portion of the money, improperly voted, as one of the quorum, at the Denver meeting where the same loan was again authorized, because an examination of the minutes of the New York meeting shows that the power then and there conferred upon the committee to negotiate the loan was full and complete, and hence there was no necessity for any further authorization at the subsequent meeting. The mere doing of an unnecessary thing, at the Denver meeting, cannot have the effect of rendering void what was lawfully done at the New York meeting. At the time of the transaction neither the good faith of the plaintiff nor of the other beneficiaries was questioned by the company or any stockholder or creditors, and months thereafter the claims of these beneficiaries, including that of the plaintiff, were recognized in the very trust deed under which the appellants claim; ¹⁵⁹ and this with the knowledge of the appellants. Where, as in the execution of the trust deed here under consideration, there is an entire absence of a want of good faith, fraud, and collusion, and the corporation is yet a going concern, no sound principle of law prohibits a stockholder or director from dealing with the corporation. A corporation is an artificial entity, and one of the principal objects of its creation is to contract with individuals in due course of business. This it may do with its directors and stockholders as well as with others; and, under the weight of American authority, at least, contracts made by the corporation with its officers are not void per se, but at most voidable merely, at the election of the corporation or its representatives, within a reasonable time. Neither the corporation nor a stockholder is complaining here. It is quite true that since the will of such an officer goes to make up or forms a part of the will of the legal entity, and the officer is therefore, in some sense, on both sides of the contract—is deal-

ing with a creature of which he forms a part—his contract with the corporation will be very carefully and closely scrutinized in equity, and will be set aside if not made in the utmost good faith. This doctrine was recognized by this court in *Mercantile Co. v. Mt. Pleasant Equitable Co-operative Inst.*, 12 Utah, 213, where it was said: "So, in the absence of contrary legislation, a mortgage executed by a corporation under embarrassed circumstances, to enable it to continue its business, will be sustained if the whole transaction be in good faith; and a corporation may also, in like manner, obligate itself to a stockholder or director. But in such last cases a court of equity will very closely scrutinize the transactions, and, in case of a contest between a general creditor and a director or other managing officer, will require of the latter very strict proof of good faith, and that ¹⁶⁰ the mortgage or other encumbrance was not executed in expectancy of insolvency, for the purpose of securing an advantage over other creditors; and such transactions may be set aside on slight grounds."

In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, Mr. Justice Miller, delivering the opinion of the court, said: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation, when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given": 3 *Thompson on Corporations*, secs. 4059, 4061; *Harts v. Brown*, 77 Ill. 226; *Saltmarsh v. Spaulding*, 147 Mass. 224; *Smith v. Skeary*, 47 Conn. 47; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291; *Leavenworth Co. Commrs. v. Chicago etc. Ry. Co.*, 134 U. S. 688. Upon the foregoing considerations, we are of the opinion that the trust deed executed June 1, 1894, is valid.

This brings us to the question of the validity of the trust deed executed to A. Hanauer, trustee, on September 24, 1894. The appellants maintain that this trust deed is valid, while the

respondents insist that it is void, because: 1. No notice to directors was given of the meeting at which it was authorized; 2. The company at the time of its authorization and execution was insolvent; and 3. For actual fraud. The main controversy on ¹⁶¹ this branch of the case is respecting the legality of the meeting held on September 24, 1894, and the motives which prompted the execution of the trust deed of that date. On the question of notice to directors of the meetings of the board, article 2 of the by-laws of the corporation, in conformity with section 493 of 1 Mills' Annotated Statutes of Colorado provides "The board of directors shall hold meetings, when called by the secretary, upon request of the president or any three directors, upon timely notice thereof." Under this provision of this by-law, the directors were required to hold meetings, and were to have timely notice; that is, every director was entitled to have notice in some way of each and every meeting of the board. In general, the directors had no authority to act, except when lawfully convened upon notice to all of them. This is a rule common to all corporations, and prescribes the mode for convening the agents to transact corporate business. A corporation, being but an artificial entity, has but one will, and this will is collected by the sense of a majority of the directors. Its will so collected, directs and controls the corporate acts. It is therefore important that every director should have an opportunity to be heard on all matters affecting the corporation, so that, through the sense of all, its best interests may be subserved. Every director is entitled to the reasoning, judgment, and advice of every other director, and cannot be deprived therefrom through failure to give notice. So the stockholders are entitled to have the corporate business conducted in view of the experience and wisdom of all the directors, and of this right they cannot be deprived by the arbitrary will of a quorum. It is true it is not imperative for every director to be present at every meeting, but he should, if possible, have notice, and an opportunity ¹⁶² to be present; for where matters to be acted upon call for deliberation and judgment, all interests and parties to be affected should have the benefit of the wisdom and counsel of all those intrusted with the decision. Although all may not concur, still the arguments and information of each may modify and affect the conclusion which otherwise might be reached. If notice were not required, it would doubtless frequently happen that the director, whose judgment because of his superior

knowledge, power of perception, and experience in the corporate affairs, would carry the greatest weight in the deliberations, would, through lack of notice, be absent, and the other directors deprived of the benefit of his arguments. There are other reasons why personal notice must be given to the directors of all meetings of the board for which the time and place of holding the same are not stated in the by-laws or rules of the corporation. If the law were otherwise, the interests and rights of the minority would be subject to great abuse, and even those of the majority would not be safe; for, where the minority would constitute a majority of a quorum, they might give notice to a bare quorum, and at a meeting so called change the entire policy of the majority, and transact business which would destroy the best interests of the corporation. This sequence was clearly stated by Mr. Justice Brewer in *Paola etc. Ry. Co. v. Anderson Co. Commrs.*, 16 Kan. 309, where he says that, if the rule as to notice were otherwise, then, in a "body composed of twelve members, a quorum of seven could act, and a majority of that quorum—four—could bind the body. An unscrupulous minority of four, by withholding notice to five, might thus bind both the body and the corporation." While, however, the general rule is that every director, ¹⁶³ under such by-laws as the one in question herein, must have notice of the time and place of every meeting of the board, still there may be exceptions, as where such an emergency exists as justifies immediate action on the part of the board, and the giving of notice to all the members is not practicable, or where a director should secrete himself in order to prevent a meeting, or is beyond the reach of notice; and there may be other instances where the giving of notice to every director would not be practicable, and a lack of notice would be excusable. In such cases, the rule cannot be permitted to be used as a weapon to prevent the transaction of corporate business, and thereby defeat the end and object for which the corporation was created. The general rule that notice must be given in some way to all directors of meetings of the board, where the by-laws and rules of the corporation do not provide the time and place of meeting, in order to render them valid, is well settled. In *Simon v. Sevier Assn.*, 54 Ark. 58, it was said: "No director is required to attend a meeting of directors held without authority. Every one of them is entitled to vote and be heard in all the proceedings of the board. The shareholders in the corporation are entitled to the influence and

advice of every director in the management of their affairs. Hence, in order to accomplish the object for which each director was elected, a mere majority of the directors cannot constitute a majority of the board for the transaction of business unless they meet according to, and by authority of, the by-laws or rules of the corporation, or are called together upon due and legal notice given to all of them. Assembled in any other manner, they cannot act as a board, but as individuals, and such acts are not the acts of the corporation": 5 Thompson on Corporations, sec. 6176; 1 Morawetz on Private Corporations, sec. 532; 1 Beach on Private Corporations, sec. 279; Bank of Little Rock v. McCarthy, ¹⁰⁴ 55 Ark. 473, 29 Am. St. Rep. 60; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Farwell v. Houghton Copper Works, 8 Fed. Rep. 66; Doernbecher v. Columbia City Lumber Co., 21 Or. 573, 28 Am. St. Rep. 766; Wiggin v. First Baptist Church, 8 Met. 301; Harding v. Vandewater, 40 Cal. 77; Doyle v. Mizner, 42 Mich. 332.

Appellants cited the cases of Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207, and Bank v. Flour Co., 41 Ohio St. 552, which hold that, if a quorum of directors meet and unite in any determination, the company is bound thereby, though the absent creditors had no notice; but these cases are evidently opposed to the great weight of authority, and we therefore decline to follow them. In the case at bar, it is shown that all the directors of the corporation were summoned to Salt Lake City to attend a meeting to be held on September 20, 1894, for the purpose of transacting the business and straightening up the affairs of the corporation. It was found that the one hundred thousand dollars borrowed previously, on June 1st, had been expended, but the company's plant had not been completed as had been anticipated. The corporation was fifty thousand dollars in debt, and money was needed to pay for labor, machinery, et cetera; and, it would seem, certain persons were to advance the money. On September 20th, pursuant to call, the directors held a meeting, all being present, and, upon transacting the corporate business, adjourned. At that meeting Saks was authorized to borrow ten thousand dollars for the use of the corporation, of which, it appears, the plaintiff paid two thousand five hundred dollars, and, after guarantying, with two others, the payment of the fifty thousand dollars debt, on September 21, 1894, started for Chicago, and afterward went to New York city. Directors Green and Mears resigned, and their places,

were filled by others. On September 24, 1894, David May, Andrew Saks, and J. E. Shoenberg, being a quorum of the directors, held a special meeting, as shown by the evidence, without any ¹⁶⁵ notice whatever to the absent members, or the existence of such an emergency as would excuse notice, and at such meeting the trust deed here under consideration was authorized, and then executed. The directors holding this meeting knew where the plaintiff was going, but nevertheless failed to notify him of the meeting, which was held but three days after his departure, and but four days after the regularly convened meeting. In the trust deed, Saks and May preferred themselves, for the sum of fifty thousand dollars, over the creditors secured by the trust deed of June 1, 1894, which was unrecorded; and yet there appears to be nothing to show that the corporation owed them anything. At the same meeting these directors also transferred to the trustee in the trust deed ninety-nine thousand nine hundred and ninety-seven shares of the capital stock of the Utah Mining Company, as further security. All the parties to the trust deed of September 24, 1894, and the directors who authorized its execution, knew at that time of the unrecorded trust deed, and were aware of its terms and conditions. Further record reference respecting the meeting and trust deed here under consideration would seem useless and unimportant, because the inevitable conclusion to which reflection upon the facts and circumstances shown by the record leads is that the meeting of September 24, 1894, falls within the rule above considered, and therefore, for lack of notice to the absent directors, was unlawfully convened; that all the acts done by the directors at that meeting were without force or effect; that the trust deed and transfer of the mining stock of that date are, *ab initio*, null and void.

As to the second proposition of respondents, the fact that the corporation was insolvent when the trust deed was authorized and excuted, alone, would not per se render that instrument void.

Having reached the conclusion stated above, it becomes ¹⁶⁶ unnecessary to discuss the question of fraud. It suffices to say, in relation thereto, that the transaction which culminated in the execution of the second trust deed and transfer of the stock was, under the doctrine of *Mercantile Co. v. Mt. Pleasant Equitable Co-operative Inst.*, 12 Utah, 213, also fraudulent. Nor is it necessary to discuss any of the other questions presented in the record. The decree entered by the learned court appears to

dispose of the various claims against the corporation in a lawful manner, and upon careful consideration we are not inclined to disturb that decree. The judgment is affirmed.

Zane, C. J., and Miner, J., concur.

CORPORATIONS—MEETINGS OF DIRECTORS—NOTICE.—

It is indispensable to a legal meeting of the directors of a corporation for the transaction of business that all the directors have notice, either actual or constructive, of the time and place of the meeting, unless they are all actually present thereat. The transactions of any meeting not so held are void, and evidence of such transactions are inadmissible upon a direct attack: *Doernbecher v. Columbia City etc. Co.*, 21 Or. 573, 28 Am. St. Rep. 766. Notice to all the directors of a corporation of a business meeting thereof is generally necessary to its validity, and can only be dispensed with when it is impracticable to give such notice to the minority in a case of emergency, and when the act done in the absence of one or more of them not served with notice clearly appears to be reasonably necessary as well as proper to the welfare of the corporation: *Bank v. McCarthy*, 55 Ark. 473, 29 Am. St. Rep. 60, and note. A quorum of the directors of a corporation having attended a special meeting, it will be presumed *prima facie* that all of the directors were duly notified to attend: *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601, 30 Am. Rep. 807. On the entire question of the validity of corporate acts done or authorized at a meeting not properly called, see the extended note to *Stow v. Wyse*, 18 Am. Dec. 102. As holding that notice to all the directors is not necessary, see *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Edgerly v. Emerson*, 23 N. H. 553, 55 Am. Dec. 207.

CORPORATIONS—DIRECTORS DEALING WITH.—Directors of a corporation may loan it money or indorse for it, and have the same right to collect the debt or secure themselves as is accorded to other creditors of the corporation: *Schufeldt v. Smith*, 131 Mo. 280, 52 Am. St. Rep. 628; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 47 Am. St. Rep. 245. A director or officer of a solvent corporation is a trustee and agent of it and of its stockholders only and so far as its creditors are concerned. He may deal with it, loan it money, and take security therefor, in like manner as a stranger. In such case the subsequent insolvency of the corporation will not affect such officer's right to recover his loan or enforce his security: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 653, 25 Am. St. Rep. 401, and note. As favoring a more strict rule, see *O'Connor etc. Co. v. Coosa etc. Co.*, 95 Ala. 614, 36 Am. St. Rep. 251. See, also, the monographic note to *Beach v. Miller*, 17 Am. St. Rep. 298-308.

MORRISON v. WILLARD.

[17 UTAH, 306.]

MECHANIC'S LIENS — NOTICE — SUFFICIENCY OF.—A notice of mechanic's lien which fails to show that the material was furnished for the construction of the building in question, or that any portion of the material was used in the construction, or purchased for the purpose of constructing the building referred to in the notice of lien, and which also fails to show the terms, time given, and conditions of the contract, and which contains no statement, except inferentially, as to what the contract was, how much lumber was purchased, what price was agreed to be paid for it, whether it was purchased or delivered for the purpose of constructing the building in question, or whether it was ever used therein, is insufficient and void.

MECHANIC'S LIENS — NOTICE — ESSENTIALS OF.—A notice of mechanic's lien must contain and set out, as far as the claimant is able to ascertain and disclose it, the contract between the owner and contractor, so that the price, terms, and conditions of the contract may be known as affecting the rights and interests of the subcontractor and others interested. Otherwise, the notice is insufficient and void.

MECHANIC'S LIENS.—ESSENTIAL AVERMENTS OMITTED from the notice of a mechanic's lien cannot, in an action to foreclose the lien, be supplied by averments in the complaint or by extrinsic evidence.

J. M. Bowman, for the appellant.

King, Burton & King, for the respondent.

307 MINER, J. Plaintiff commenced this action to foreclose a mechanic's lien upon property owned by defendant Clayton, arising upon its contract in furnishing material to Willard & Stewart, as subcontractors on a contract by them to build a house for defendant Clayton, and to secure a judgment against Willard and Clayton. The notice claiming a lien, as filed and set forth in the complaint, so far as material, reads as follows:

"To Whom it May Concern:

"Notice is hereby given that Morrison, Merrill & Co., a corporation duly organized under the laws of Utah, intends to claim and hold a lien on the following described premises, to wit, . . . said described premises being the property of B. J. Clayton, who contracted with H. W. Willard and R. Stewart, doing business as Willard & Stewart, to erect said Clayton a residence on above-described premises. The claimants, Morrison, Merrill & Co., as subcontractors in the first degree, having furnished Willard and Stewart lumber and building material to the amount of \$775.68, on which there is a credit of \$301.64, leaving still due and unpaid \$474.04, for which amount said lien is claimed,

together with interest at eight per cent per annum from September 10, 1896, said Willard and Stewart having bought said material and agreed to pay for the same in cash."

³⁰⁸ Defendant Clayton filed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained as to defendant Clayton. Plaintiff declined to amend, and the complaint was dismissed as to Clayton. Thereupon the plaintiff appeals to this court.

The question in the case arises upon the sufficiency of the notice under the statute. The Revised Statutes, section 1386, provides that "every original contractor within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, must, within forty days after furnishing the last material or performing the last labor for any building, improvement, or structure, or for any alteration, addition to or repair of, or performance of any labor in, or furnishing any materials for, any mining claim, file for record with the county recorder of the county in which the property or some part thereof is situated, a claim in writing containing a notice of intention to hold and claim a lien, and a statement of his demand, after deducting all just credits and offsets, with the name of the owner if known, and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last material furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or some other person." The evident purpose and object of the statute was to inform the owner or others interested as to the extent and nature of a lienor's claim, in order to facilitate investigation, and determine the relative rank and merits of the lien filed. The rights of subcontractors and materialmen can be ascertained by ³⁰⁹ reference to the lien as filed, and necessarily rest upon proof of contracts between the parties, such as accord with the terms and conditions set forth in the claim of lien filed. In order to entitle a person to a lien upon the property of another for materials furnished or labor performed, such claimant must substantially comply with all of the requirements of the statute in the statement of his claim for a lien, and in all essential particulars such

statement must be true. Whatever rights such lienor has he obtains by virtue of the statute, and a full, substantial compliance with its provisions must be observed, or his rights thereunder will fail. The lien is brought into operation by virtue of the statute. The contract for the construction of the building is entered into with a view of or with reference to the statute. The lien is a mere incidental accompaniment, as a means of enforcing payment, or a mere remedy given by statute which secures a performance provided for, but which does not exist, notwithstanding the justice of the claim, unless the claimant brings himself within the requirements of the statute, and shows a substantial compliance with its essential provisions: *Hooper v. Flood*, 54 Cal. 222; *Goss v. Sterlitz*, 54 Cal. 640; *Wagner v. Hansen*, 103 Cal. 104; *Phillips on Mechanics' Liens*, sec. 9. Under these circumstances, was the lien as filed a substantial compliance with the essential requirements of the statute? The statute requires the name of the owner, if known, to be stated in the notice. The notice recites that, "said described premises being the property of B. J. Clayton." We are of the opinion that this recital is in substantial compliance with the statute.

Again, it does not appear from the notice that the material was furnished for the construction of the building in question, or that any portion of the material was used in the construction or purchase for the purpose of ³¹⁰ constructing the building referred to in the notice of lien. In order to comply with the terms of the statute, it should appear that the material was furnished for the building in question, or was used in its construction. The statute authorizes the lien when it appears that materials were furnished for any building, improvement, or structure, et cetera. Under such a statute, when the lienor seeks to obtain a lien upon the real property of the owner, and obtains a right thereto, it is reasonable to require the lienor to show that the material was furnished for the construction of the building upon which he seeks to obtain his lien: *Fathman etc. Mill Co. v. Ritter*, 33 Mo. App. 404; *Boisot on Mechanics' Liens*, sec. 308.

The statute also requires that the notice shall contain a statement of the "terms, time given, and conditions" of the contract. This requirement of the statute was not substantially complied with. Except inferentially, the notice contains no statement as to what the contract was, how much lumber was purchased or furnished, what price was agreed to be paid for the lumber,

whether the lumber was purchased or delivered for the purpose of constructing the building in question, and whether it was ever used in the building in question. The nature of the contract and the time in which it was to be performed, whether the price as charged was the price agreed to be paid, what the contract was between the owner and the contractor, and whether the credit allowed was a just credit or otherwise, does not sufficiently appear. All these questions were largely left to conjecture and uncertainty: *Hooper v. Flood*, 54 Cal. 221; *Boisot on Mechanics' Liens*, 401; *Gates v. Brown*, 1 Wash. 470; *Wagner v. Hansen*, 103 Cal. 104.

The Revised Statutes, section 1373 (Sess. Laws 1894, p. 44), provides that "in case of a contract between an owner and a contractor, the lien shall extend to the entire contract price, and such ³¹¹ contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price, and, after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor." Under this statute, no lien of the subcontractor can extend beyond the contract price between the owner and the contractor. The extent of the rights of the subcontractor under his lien will depend upon the original contract between the owner and the contractor. It is therefore necessary that the notice of lien should contain and set out, so far as claimant is able to ascertain and disclose it, the contract between the owner and the contractor, so that the price, terms, and conditions of the contract may be known as affecting the rights and interests of the subcontractor and others interested; *Boisot on Mechanics' Liens*, sec. 402; *Gates v. Brown*, 1 Wash. 470. These essential averments, having been omitted in the notice of lien, cannot be supplied by averments in the complaint, or by extrinsic evidence: *Bertheolet v. Parker*, 43 Wis. 551; *Malter v. Falcon Min. Co.*, 18 Nev. 209; *Wagner v. Hansen*, 103 Cal. 104.

We are of the opinion that the demurrer was properly sustained. We find no error in the record. The judgment of the district court is affirmed, with costs.

Zane, C. J., and Bartch, J., concur.

MECHANIC'S LIEN—NOTICE—ESSENTIALS.—A mechanic's lien notice is sufficient if it describes the premises and states the amount due, to whom and from whom, and for what it is due: *Coburn v. Stephens*, 137 Ind. 683, 45 Am. St. Rep. 218, and note; *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835, and note; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675, and note.

A notice of a claim for a mechanic's lien required to be made and filed for record cannot be amended or reformed. The notice of the claim must be perfect when filed: *Madera Flume etc. Co. v. Kendall*, 120 Cal. 182, 65 Am. St. Rep. 177, and note; *Fernandez v. Burleson*, 110 Cal. 164, 52 Am. St. Rep. 75, and note. But it seems that a mere imperfect description of the property in the lien notice may be aided by extrinsic evidence where there are proper allegations in the pleadings, upon the principle that that is certain which can be made certain: *Coburn v. Stephens*, 137 Ind. 683, 45 Am. St. Rep. 218.

STAINES v. BURTON.

[17 UTAH, 331.]

WILLS — CHARITABLE TRUST — DESIGNATION OF TRUSTEE.—If a testator, after providing for certain beneficiaries in his will, declares therein that "after the death of each one I desire that my executors shall make over to the presiding bishop of the Church of Jesus Christ of Latter-Day Saints the half of my estate from which that wife's income was derived. The presiding bishop shall receive it in trust and expend the annual income according to his discretion, for the benefits of the members of the Church of Jesus Christ of Latter-Day Saints," the will clearly designates such presiding bishop as trustee and sufficiently describes the beneficiaries under the will.

WILLS—CHARITABLE TRUSTS.—A bequest by will to the presiding bishop of a certain church, in trust, to expend the annual income, according to his discretion, for the benefit of the members of such church, "whether it be for public schools, parks, watering cities, acclimatizing foreign plants, or anything else whereby the members may be benefited, creates a charitable use or trust, and is not within the rule against perpetuities.

WILLS—CHARITABLE TRUSTS—CONSTRUCTION.—If a charitable intent appears on the face of a will, but the terms used are broad enough to allow the fund being applied either in a lawful or unlawful manner, the gift must be supported, and its application restrained within the bounds of the law.

Shepard & Tanford, for the appellant.

L. G. Young and F. S. Richards, for the respondents.

334 ZANE, C. J. It appears from this record that William Carter Staines, late of Salt Lake City, made his will on March 1, 1873, devising certain real estate to his two wives, Liliās and Priscilla, and in which he disposed of his remaining estate as follows: "My will is that my executors ³³⁵ shall sell it, and invest the proceeds as they think best, to be safe, and to yield the most income. This income I wish to have divided as it accrues, quarterly or semiannually, between the above-named Liliās and Priscilla, one-half to each as long as she lives. After

the death of each one, I desire that my executors shall make over to the presiding bishop of the Church of Jesus Christ of Latter-Day Saints the half of my estate from which that wife's income was derived. The presiding bishop shall receive it in trust, to expend the annual interest or income, according to his discretion, for the benefit of the members of the Church of Jesus Christ of Latter-Day Saints, whether it be for schools, parks, watering cities, planting forests, acclimatizing foreign plants, or anything else whereby the members may be benefited." He made a codicil to the will on January 20, 1881, devising certain other lands to the appellant, his only child, to be held and used in case he should die without issue, and prior to testator's wives, Liliās and Priscilla, "the same to descend to and be used and disbursed as stated in the last clause of my said last will and testament"; and he departed this life on the second day of August, 1881. The property subject to the last clause of his will is now estimated to be of the value of \$42,526.

Appellant's counsel insist that it is uncertain from testator's language who should hold the residue of the estate as distinguished from the income from it—whether the body known as the Church of Jesus Christ of Latter-Day Saints or its presiding bishop. The language clearly says the presiding bishop is to receive it in trust, and this is equivalent to saying he shall hold it in trust.

Counsel also insist that it is uncertain for whose benefit the property must be held after the death of his wives—whether for the Church of Jesus Christ of Latter-Day ³³⁶ Saints or its members. As to the beneficiaries, there appears to be no room for a reasonable doubt. The language of the clause is: "The presiding bishop shall receive it in trust, to expend the annual interest or income according to his discretion, for the benefit of the members of the Church of Jesus Christ of Latter-Day Saints, whether it be for schools, parks, watering cities, planting forests, acclimatizing foreign plants, or anything else whereby the members may be benefited." The expenditures are not required to be made for church purposes. The benefits contemplated are temporal, not spiritual; they do not relate to good faith or worship. Besides, the expenditures are required to be made for the benefit of the members of the church. The class of persons to be benefited is distinguished and identified by church membership.

It is further urged that the clause creates a perpetuity, and that it is therefore void. The estate subject to the clause is certainly taken out of commerce for a longer period than a life in being and twenty-one years beyond. It is unalienable for all time, and must be held void if subject to the rule of law forbidding perpetuities. However, that rule does not apply to grants, devises, or bequests to charitable uses.

It is claimed the testator devoted the property in question to charity. This brings us to the question, Are the uses expressed in the will charitable? The income provided was to be expended for the benefit of the members of the church. They were to be benefited by devoting it to schools, parks, watering cities, planting forests, and to acclimatizing foreign plants, or in aid of other enterprises to benefit the same class of persons. By the general expression, "anything else whereby the members may be benefited," we are authorized to assume the testator ³³⁷ meant enterprises similar to those mentioned in the same connection, and, if those were charitable, we may infer he intended charitable objects by his general expression. At the time the testator made his will a very large majority of the people of the territory were Latter-Day Saints. In fact, there were comparatively few that were not so recognized. In dedicating a portion of his estate to their benefit, he devoted to the good of a class that included almost the entire public. He selected the enterprises and objects which he intended to encourage and aid from the standpoint of an early settler in an arid region. He was a resident of a city with but few schools, and without parks, and for whose people there was an increasing demand for water. He was in a new country without forests, and to which comparatively few foreign plants had been introduced. He had provided for his wives and his only child, and wanted to devote the remainder of his estate to the benefit of the people of his own faith. The enterprises he wished to foster and aid by his bounty were the ones upon which the advancement, prosperity, and the welfare of the people largely depended. He gave without ostentation, and from motives free from the taint of selfish or private considerations. The objects upon which the testator directed the income from the estate in question to be expended were undoubtedly charitable in a legal sense: Jackson v. Phillips, 14 Allen, 529; 1 Beach on Trusts, sec. 371; Russell v. Allen, 107 U. S. 163; Anderson's Law Dictionary, term "Charity."

In *Jackson v. Phillips*, 14 Allen, 539, the court said: "It is well settled that any purpose is charitable in the legal sense of the word which is within the principle and reason of the statute [43 Elizabeth, c. 4], although not expressly named in it," and the illustrations give are: "Gifts for the promotion ³³⁸ of science, learning, and useful knowledge, though by different donors and in different ways from those enumerated under the second class; and gifts for bringing water into a town, for building a town house, or otherwise improving a town or city, though not alluded to in the third class, have been held to be charitable." And later in the same opinion the court uses the following language: "A precise and complete definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon in *Morice v. Bishop of Durham*, 9 Ves. 405, 10 Ves. 541, that those purposes are considered charitable which are enumerated in statute of 43 Elizabeth, or which by analogies are deemed within its spirit and intentment, leaves something to be desired in point of certainty, and suggests no principle. Mr. Binney, in his great argument in the *Girard will case*, 41 defined a charitable or pious gift to be 'whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish.' And this definition has been approved by the supreme court of Pennsylvania: *Price v. Maxwell*, 28 Pa. St. 35. A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the supreme court of the United States: 'A gift to a general public use, which extends to the poor as well as the rich.'" Except in a few states, the statute of 43 Elizabeth, chapter 4, is admitted to be the principal test of what are in law charitable uses; and many purposes not named in it have been held to be charitable when within the reason and spirit of the statute. The testator named in the clause quoted ³³⁹ schools, parks, a water supply to cities, planting forests, acclimatizing foreign plants, and any other similar enterprise, as objects to which his trustee was authorized to devote the income from the estate mentioned. The terms of the trust did not require the trustee to aid all of them. He might devote all of the income to schools or parks, or to either or any of them, if, in his judgment, by so doing, the members of the

church would be benefited most. He did not name any unlawful object, or any purpose forbidden by the law against perpetuities; and, if the trustee were to attempt to expend the fund for any unlawful purpose, the court, in the exercise of its chancery jurisdiction, would be authorized to limit such expenditures to charitable and lawful purposes: *United States v. Late Corporation etc.*, 8 Utah, 342; *Jackson v. Phillips*, 14 Allen, 539; *Mormon Church v. United States*, 136 U. S. 1; 1 Beach on Trusts, sec. 324. In *United States v. Late Corporation etc.*, 8 Utah, 342, the court said: "When the dedication is broad enough to allow the trustee to apply the fund to unlawful as well as lawful purposes, the court will limit the application to the lawful ones. When the terms of the gift authorize the trustee to devote the fund to either of two objects—one lawful and the other illegal—its application will be confined to the legal purpose, and the unlawful one will be rejected." In the case of *Jackson v. Phillips*, 14 Allen, 539, the court said: "When a charitable intent appears on the face of the will, but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner, the gift will be supported, and its application restrained within the bounds of the law. The most frequent illustrations of this in the English courts have arisen under the statute of 9 George II, chapter 36 (commonly called the 'statute of mortmain'), prohibiting ³⁴⁰ devises of land, or bequests of money to be laid out in land, to charitable uses. In the leading case Lord Hardwicke held that a direction of executors to 'settle and secure, by purchase of land of inheritance or otherwise, as they shall be advised, out of my personal estate,' two annuities, to be paid yearly forever for charitable objects, was valid, because it left the option to the executor to make the investment in personal property, which was not prohibited by the statute; and said, 'This bequest is not void, and there is no authority to construe it to be void, if by law it can possibly be made good,' or (according to another, and perhaps more accurate, report) 'no authority to construe it to be void by law if it can possibly be made good.'" A definition of a legal charity applicable to all cases can hardly be found. And when a charitable intent appears on the face of the will, and the terms used are broad enough to allow the fund to be used for charitable objects, and for those within the rule of law forbidding perpetuities—for lawful and unlawful purposes—the decisions are conflicting as to whether the gift will be good as to the lawful purpose, and its application restrained to that. Some of the cases

apparently in conflict may be reconciled, while others cannot. We are of the opinion that the views we have expressed are supported by the weight of authority and by reason. The decree of the court below is affirmed.

Bartch and Miner, JJ., concur.

CHARITABLE TRUSTS—DESIGNATION OF TRUSTEE AND BENEFICIARIES.—A gift for a specific charitable purpose will not fail for want of a trustee: *Sears v. Chapman*, 158 Mass. 400, 35 Am. St. Rep. 502. Gifts and trusts for public charitable uses are favorably and liberally construed, and in such cases it is not necessary that the trustee be known or capable of taking, nor that the beneficiary or objects of the charity be certain and definite: *Raley v. Umatilla County*, 15 Or. 172, 3 Am. St. Rep. 142. All charities are not public, however, and when the right to share in the benefits of a charity depends on the fact of voluntary association with some particular society, while all not members of such society are excluded, the charity is not purely public in its nature: *Philadelphia v. Masonic Home*, 160 Pa. St. 572, 40 Am. St. Rep. 736. The general rule is, that in charitable trusts there must be certainty respecting both the beneficiaries of the trust and the nature of the benefit they are to receive under it: See the monographic note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756. Accordingly, it has been held that a bequest of property to be used by a Roman Catholic Bishop of the diocese of G., for the benefit and behoof of the Roman Catholic Church, is void for uncertainty: *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106. As to what purposes are charitable in their nature, so that a gift to them will constitute a valid trust, see the monographic note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 256-269; *Dye v. Beaver Creek Church*, 48 S. C. 444, 59 Am. St. Rep. 724, and note; *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562.

CHARITABLE TRUSTS.—THE RULE AGAINST PERPETUITIES does not apply to gifts for charitable uses: *Mills v. Davison*, 54 N. J. Eq. 659, 55 Am. St. Rep. 594, and note.

CHARITABLE TRUSTS—CONSTRUCTION.—If two modes of construction are fairly open, one of which turns a charitable bequest in a will into an illegal perpetuity, while the other makes it valid and operative, the latter construction must be adopted: *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346.

IN RE CHRISTENSEN.

[17 UTAH, 412.]

INSANITY—OPINIONS OF NONEXPERTS.—Intimate acquaintances of a person whose sanity is the subject of investigation and who have been close observers of his conduct, though not competent as experts, when they can instance acts indicating mental derangement, are competent to give their opinions as to the sanity or insanity of such person.

CONSTITUTIONAL LAW.—THE TERRITORIAL LAW of Utah so far as it purported to confer general common-law and chancery jurisdiction on probate courts is void.

MARRIAGE AND DIVORCE—WANT OF JURISDICTION. A decree of divorce granted without jurisdiction of the subject matter or of the person, without cause stated and without proof, is absolutely void.

JUDGMENTS—WHEN VOID—COLLATERAL ATTACK.—A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question.

JUDGMENTS—VOID CANNOT BE VALIDATED.—A judgment or decree which is absolutely void cannot be validated or confirmed by subsequent legislation.

JUDGMENTS—JURISDICTION.—If a statute purporting to confer jurisdiction is void, no intendment of law or presumption of fact can be made in favor of the jurisdiction.

JUDGMENTS—WHEN MAY BE VALIDATED.—If a court has jurisdiction of the subject matter of the suit and of the person, and some essential step is omitted which the legislature has the right to dispense with, it may validate the judgment or decree, notwithstanding the omission or irregularity.

MARRIAGE AND DIVORCE.—PROCEEDINGS FOR DIVORCE ARE JUDICIAL IN THEIR NATURE, and should be had in courts of justice under constitutions conferring judicial power on those tribunals. A divorce cannot be granted lawfully except for sufficient cause, upon proof and with notice to, or the appearance of, the party complained of.

JUDGMENTS.—ESTOPPEL CANNOT BE BASED on a void judgment or decree.

JUDGMENTS AS ESTOPPEL.—If the court has jurisdiction of the subject matter of the suit and of the parties, and the decree or judgment may be reversed or set aside for error or irregularity, and the defendant waives his right to have this done by executing or accepting it, he is estopped from denying its binding effect, but, if such judgment is void for any reason, he is not estopped.

Moyle, Zane & Costigan and W. D. Livingston, for the appellant.

Reid & Cherry, Rawlins, Thurman, Hurd & Wedgwood, for the respondent.

⁴¹⁴ ZANE, C. J. It appears from the record in this case that Herman J. Christensen, late of the city of Manti, in the county

of Sanpete, in the state of Utah, died intestate on June 26, 1897, the owner of real and personal property valued at seventy-seven thousand five hundred and seventy-one dollars and ninety-six cents; that three children by Hannah Christensen, his first wife, and two children by his last alleged lawful wife, Petrea Sorenson Christensen, from whom he was divorced after their birth, survived him; that after Luther T. Tuttle had been appointed administrator of the intestate's estate, and had filed an inventory thereof in the probate court of said county, Hannah Christensen, by her guardian, Theodore E. Christensen, filed her petition, as the intestate's widow, for an allowance from his estate. It also ⁴¹⁵ appears that the administrator of the intestate answered the petition admitting the marriage, but alleging a divorce on December 5, 1854, by a decree of the probate court of Sanpete county, and that petitioner afterward intermarried with John Hathaway, and that she was therefore estopped from claiming she was the widow of the decedent. It further appears that the district court, sitting for the disposition of probate business, after hearing the evidence offered by both sides, without making findings, entered an order denying the prayer of the petitioner. From this order the petitioner, by her guardian, has appealed to this court.

These alleged facts present for our decision the question, Was petitioner the lawful wife of the intestate at the time of his death, and as his widow is she entitled to an interest in his estate? The determination of that question requires us to decide upon the validity of the alleged decree; and, if we shall find the decree to be void, to decide whether her conduct estops her from obtaining the rights of a widow. An issue as to petitioner's sanity was also raised on the trial. Insanity, if found, would appear to be more pertinent to the question of estoppel, but we think it should have a bearing upon the decision of the other question. Therefore we will first consider the evidence upon that issue.

It appears from the evidence in the record that the petitioner and the intestate were married in the kingdom of Denmark about 1843; that three sons were born to them there; that a daughter was born to them upon the plains.

Mrs. Snow, an old resident of Manti, who knew them in Copenhagen, and emigrated to Utah in the same company, testified, in substance, that Hannah Christensen had great trouble because her husband, after they reached this country, always wanted to

get rid of her, ⁴¹⁶ and take the children from her, and was always looking after other women; that he took up with a girl by the name of Elizabeth while crossing the plains, whom he married at Springville, Utah, on the way to Manti. Witness knew the petitioner was left behind at Salt Lake City; that she followed out to the Jordan river, and her husband took her back; that she knew them afterward in Manti; that her troubles appeared to unhinge her mind; that she had a great deal of trouble, and had queer ways; that there always appeared to be something on her mind vexing her, caused by her husband's actions; that petitioner's peculiar actions indicated her mind was affected; that her mental condition has appeared better since the death of her husband.

Elsie C. Dungar also testified, in substance, that she came across the plains in the same company with Herman J. Christensen and Hannah, his wife. Their first stop was at Salt Lake City. Remembered the time when Herman tried to get rid of his wife. He put her away. She wanted to come with him and the children. When the company left, she went out in the night to the camp. They had three little boys, and a little baby, Sarah, born on the plains. The petitioner followed out to the camp, and her husband and another man took her back to Salt Lake City, because he did not want to take her with him. He took the boys, and left the baby with her mother. He had a woman with him, who was the first one he married afterward. The petitioner afterward followed her husband. She was troubled after she reached Manti, because her husband had put her away, and she was flighty—wrong in her mind. She could work a little. She had no place to go to. She remained in Manti many years, and lived at witness' home part of the time. After her sons ⁴¹⁷ grew up, they built her a small house. Afterward she was moved to Gunnison, a neighboring town, for a time. She traveled around the streets night and day. She came to witness' house many times, and would sleep there. She was running around like an irresponsible person. She had no home there.

Theodore Christensen testified, in substance, that he was the second son of the petitioner and intestate. The eldest son was dead. Witness was born in the kingdom of Denmark in 1845, and came with his parents to Utah in 1853, and remembered the trouble when his mother was left behind, and the children were brought to Manti. Remembered her following out to the camp when they left Salt Lake, and how she hung on to the wagon, and tried to come with the children. Remembered all that.

"At that time, after the trouble began, my mother's mind failed her. It became very weak. She appeared to be losing her reason. Witness noticed the change, even as a boy. His mother followed them to Manti, a few months after she was left behind. When she got there she was not allowed to see her children. She came to the house and to the windows, and was screaming and crying, and we children wanted to get out to her, and were not allowed to. Quilts were put up to the windows, and some woman came, and said, 'For God's sake, let her see her children.' After that she would come every little while to see us, but was not allowed to stay. She appeared to be out of her right mind. Recently her mental condition has improved." The children on the streets called her "Crazy Hannah" (witness objected to that). At times she would talk rationally, and at other times she appeared crazy. Witness' father brought another woman with him to Manti. Did not know why his mother was left behind ⁴¹⁸ and deserted. When witness grew up, he built a little house for her, and his mother and Sarah lived there until she moved to Gunnison. "We boys took care of her after we grew up. She has wandered around a good deal."

Titus Christensen, the third son, testified, in substance, that he was two years old when his father and mother reached Salt Lake City, and can remember as far back as 1860. Witness remembered that he liked to go and see his mother, but his father would object. That his mother talked about his father a great deal, and appeared to be confused and bothered. After witness got old enough, he thought she was deranged. She said wild things. She treated witness well, but she would talk to herself about reformation. Was troubled about the way father was doing. After witness grew up, people told them they ought to have a guardian appointed for her.

Witness Luke testified, in substance, that he had known the petitioner since 1854. That his wife had employed her to wash for her. Sometimes she would talk reasonably, and at other times her mind appeared to be unbalanced. That was his deliberate judgment. When the name of her husband was mentioned, or her children were spoken of, she would fall all to pieces. She would say Herman was a villain. Had robbed her of her children. Witness would try to pacify her, but it did no good. Some people called her "Crazy Hannah." She was treated like a crazy person.

Sarah Martin testified, in substance, that she was the daughter of petitioner and intestate, and was born on the plains. Could

remember living with her mother as a child. She made pictures on the walls, and said that was witness' father. Sometimes she would say the devil was after him with big sticks. She would run out at all hours of the night screaming, and witness would lie in bed, ⁴¹⁹ when a little girl, also screaming. "Her mental condition has continued the same until the present, except of late years she has been more calm, but she still makes the pictures on the walls, and thinks they are trying to murder her." Whenever she would talk about witness' father, she would go into a frenzy. Witness and her mother lived for a while in an old cellar. Her mother broke pictures once; and set the house on fire at another time, and partially burned it. She said something bothered her; that she could hear it all the time, but she could not tell what. It was reported that Hathaway was a deserter from Johnson's army, and drifted to Manti, and her mother was a poor demented woman running around, and that he took advantage of her.

In substance, such was the testimony of the witnesses who knew the petitioner longest and most intimately. Other witnesses, who saw petitioner occasionally, and whose acquaintance was not so intimate, did not think she was insane. Some of them, however, who had talked with her, testified that, when her husband's name would be mentioned, she would become agitated and greatly excited.

The opinions of witnesses not competent as experts, and not intimately acquainted with persons whose sanity is the subject of investigation, unless they have closely observed their appearance and expressions, are worth but little; while the opinions of intimate acquaintances who have been close observers of their conduct, though not competent as experts, when they can instance acts indicating mental derangement, are often more reliable and more valuable than professional experts, who have not had the benefit of such intimate acquaintance. It must be conceded that the treatment of this woman, and the wrongs and hardships she endured were well calculated to agitate ⁴²⁰ her feelings, and arouse her emotional nature, becloud her reason, and to impair and unsettle her mental balance and equilibrium. One witness, who had known her in Denmark, after speaking of her troubles on the plains, at Salt Lake, and Manti, said, in her judgment, "They unhinged her mind." Another said, "Her mind became unbalanced." Another said that "she talked queer—not like others in similar trouble; that she was flighty, and her mind was wrong." Another said she was regarded as crazy; that she was

called "Crazy Hannah." Her daughter said she would get out of bed at night, and go screaming into the street; that she covered the walls of her house with pictures, and called some of them devils with big sticks after her husband; that she broke pictures on one occasion, and set her house on fire on another, saying they bothered her; that she was tired of living there; that she could hear them all the time, but she did not know what.

Such are some of her acts and expressions, detailed by those who knew her best. It would appear that her feelings and her emotional nature were subject to uncontrollable excitement and agitation, and that her mind was haunted with delusions, and that, therefore, it was not in its normal condition. There is no evidence tending to prove that her mind was unsound before her husband deserted her and took another wife, and forcibly separated her from her children. After she had been put away by her husband (as one witness expressed), and she was left behind, and had attempted to follow and hold on to the wagon in which her children were, and after she had been in the night forcibly brought back to Salt Lake by her husband and another man, and after she had followed her husband and children more than one hundred and fifty miles, to Manti, and was denied admission to the house where her children were, or the privilege of seeing them, she became incapable ⁴²¹ of controlling her feelings and emotions and of exercising her reason. Her mental equilibrium and balance was overthrown, and a cloud passed over her mind, her life was blasted, and she was left a mere wreck. There can be no doubt that the case of this much wronged and abused woman appeals strongly for remedial justice, and that she should be given a portion of her husband's estate during the remainder of her days, if the rules of law will permit.

The decree on which the administrator relies to show the petitioner was not the intestate's wife, at the time of his death, is as follows: "December 5, 1854. Probate court of Sanpete county, in session, by a special call by his honor, George Peacock, in place of the regular term of the following Monday, and proceeded to business. The court then proceeded to investigate the charge contained in the petition presented by Hammond J. Christensen v. Hanne Christensen for divorce. Polance Kofert was sworn as interpreter to interpret the Danish language. The court heard the testimony, and decided that Hammond J. Christensen be divorced, and that he have control of three children, namely, Julius H. Christensen, Theodore Edward, and

Titus I. E. Christensen, and Hanne Christensen to have F. C. Christensen, aged 18 months, until otherwise directed by the court, and the said Hammond J. Christensen to pay all costs of suit, which is ten dollars. Court adjourned. George Peacock, Probate Judge." To its admission in evidence the petitioner, by his counsel, objected on numerous grounds, and exceptions were taken to its admission. The decree recites that the court was in special session by a special call of the judge, in place of the regular term, in convene on the following Monday. By what authority such special session was called and held does not appear from the record. ⁴²² The decree also recites that the court proceeded to investigate the charge contained in the petition presented by Hammond J. Christensen against Hanne Christensen for divorce. It appears from the transcript that petitioner's husband was named Herman J. Christensen, while the name in the decree is Hammond J. Christensen. It is not stated what the charge in the petition was, or what the petition contained, and there were no findings made by the court, and it does not appear otherwise that there was any petition filed. It is recited that the court heard the testimony, and decided that Hammond J. Christensen be divorced (from whom it is not mentioned), and that he should have control of three children, naming them, and that Hanne Christensen should have F. C. Christensen, aged 18 months, until otherwise ordered.

Counsel for the petitioner insist that the foregoing decree is absolutely void for several reasons: First, because the probate court, who assumed to render it, did not have jurisdiction of the subject matter of the suit. An act of the territorial legislature in force March 6, 1852, under which the probate court assumed jurisdiction to enter the decree, expressly provided that probate courts should have jurisdiction in all cases of divorce. But that legislature possessed only such authority to confer jurisdiction on those courts as the act of congress known as the "organic act" conferred upon it. While that act conferred common-law and chancery jurisdiction upon the supreme and district courts, respectively, it gave to the probate court only such jurisdiction as its name indicated—such as that court had theretofore exercised in England and in the United States. It did not give it general jurisdiction in chancery or at law, nor did it authorize the legislature of the territory to do so. Divorce causes belong to chancery jurisdiction. In *Ferris v. Higley*, 20 ⁴²³ Wall. 375, the supreme court of the United States held that the territorial law now in question, so far as it purported to confer general

common-law and chancery jurisdiction on the probate courts, was absolutely void: *Perea v. Barela*, 6 N. Mex. 239; *Perea v. Barela*, 5 N. Mex. 458; *Cast v. Cast*, 1 Utah, 112; *Higbee v. Higbee*, 4 Utah, 19. The authority of the court to try a cause and render judgment must be determined from the facts alleged as the cause of action and the law conferring and limiting its powers. If the only law purporting to confer jurisdiction on the court to try the case is void, then all acts of the court are without authority, and also void. In such a case, no intendment of law or presumption of fact can be made in favor of its jurisdiction, whether it be as to the subject matter or the person, or as to averment or proof. Therefore, we must hold the decree admitted in evidence absolutely void: 1. Because the court had no jurisdiction to try a divorce case; 2. Because there was no proof of service of notice on the defendant; 3. Because it does not appear that any cause for a divorce, such as the law required, was stated; and 4. Because it does not appear that any proof was made on which to grant the decree. It is true that one witness testified that Hannah Christensen was present, and said she did not want to be divorced. That could only be regarded as an objection to the divorce, not as an entry of appearance, even if she had been competent to enter her appearance: *Freeman on Judgments*, 4th ed., secs. 120, 123; *Galpin v. Page*, 18 Wall. 351. "A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question": 1 *Freeman on Judgments*, sec. 120; *Browne's Jurisprudence of Insanity*, sec. 1.

424 Counsel for the intestate's estate rely on the following provision of section 3 of an act of Congress in force June 23, 1874, as follows: "All judgments and decrees heretofore rendered by the probate courts which have been executed, and the time to appeal from which has by the existing laws of said territory expired, are hereby validated and confirmed." A preceding clause of the same section expressly provides that "probate courts, in their respective counties, shall have jurisdiction in the settlement of estates of decedents and in matters of guardianship and other like matters; but otherwise they shall have no civil, chancery, or criminal jurisdiction whatever; they shall have jurisdiction of suits of divorce for statutory causes concurrently with the district courts." In addition to the territorial statute of March 6, 1852, intended to confer jurisdiction upon the

probate courts of the territory to grant divorces, the same legislature passed an act in force January 19, 1855, section 29, declaring: "The several probate courts in their respective counties have power to exercise original jurisdiction, both civil and criminal as well in chancery as at common law, . . . and they shall be governed in all respects by the same general rules and regulations as regards practice as the district courts." Under this provision the probate courts for nine years had assumed jurisdiction to try causes and render judgments in criminal and civil cases both at law and in equity. During this time men have been tried in those courts in the various counties, and convicted of various crimes, and sentenced to imprisonment or fined, and had served terms of imprisonment; others had paid their fines. Judgment had also been rendered against parties for sums varying in amounts, which had been paid, and determining property rights that had been executed. Doubtless Congress presumed the parties had been served with process, or had ⁴²⁵ appeared, and had received justice; that in some cases sentences had been made upon pleas of guilty; that some of the judgments and decrees in civil cases had been by agreement or confession; that many had been paid, and possession of property, personal or real, had been given under others; and in that way the judgments or decrees had been executed, and justice had been done. It does not appear from the language of the curative provision that Congress understood that the judgments and decrees referred to were absolutely void. Judgments and decrees that had been executed, and from which the time for appeal had expired, were intended. No appeal can be necessary from a judgment that is entirely and absolutely void. Such judgments and decrees are of no effect, and parties endeavoring to execute them may be treated as trespassers. As we have seen, "a judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question." Again, the same author says: "A void judgment is, in legal effect, no judgment. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress": Freeman on Judgments, secs. 117, 120.

At the time the curative provision in question was enacted by Congress, the cases of *Cast v. Cast*, 1 Utah, 112, and *Ferris v. Higley*, 20 Wall. 375, declaring the probate courts of Utah had not common-law or chancery jurisdiction, and that so much of the act of the territorial legislature as purported ⁴²⁶ to give them jurisdiction in divorce cases and general jurisdiction in criminal and civil cases were absolutely void, had not been rendered. We are, therefore, not disposed to hold that Congress intended to make a decree like the one admitted in evidence and relied upon in this case valid—a decree rendered without jurisdiction to grant a divorce, and without jurisdiction of the person of the defendant, and in which it did not appear that a petition was filed stating any cause for divorce, as the law required, and in which it did not appear that any proof was made of a cause for divorce, as required by law; and if the national legislature had, by the provision in question, intended to validate such a decree, absolutely void beyond all question, the provision would have been as void as the decree. The United States is based on the will of the people, possesses only such powers as they have expressly conferred upon it, and such as are necessary to the use of such as are expressed, and no more. And the legislative branch of those delegated powers Congress possesses. It does not possess absolute power. It has no more power to make a valid decree out of a void one than it has to make such a decree out of a sheet of blank paper. It cannot make black white, or white black, or something out of nothing. Undoubtedly, the law-making department of the government may validate judgments and decrees voidable on account of errors or irregularities merely. If the court has jurisdiction of the subject matter of the suit and of the person, and some essential step is omitted which the legislature had the right to dispense with, it may validate the judgment or decree, notwithstanding the omission or irregularity. The legislature prescribes the methods and mode of procedure, and the rules under which judicial power shall be exercised, and in doing so may dispense with such formalities as are not ⁴²⁷ essential to the jurisdiction of the court. Whatever it may have dispensed with by law before action brought it may dispense with by statute afterward. It cannot, however, dispense with jurisdiction of the subject matter of the suit, or of the parties, nor with a complaint, declaration, petition, or claim. There must be some right, duty, or claim specified. There must be a subject matter stated, and it must be such a one as the court has the right to take juris-

diction of, and, if the judgment or decree is to be based upon facts, they must be first ascertained and found to exist. These requirements are essential to remedial justice, and appear to be axiomatic.

Judge Cooley says: "We have elsewhere referred to a number of cases where statutes have been held unobjectionable which validated legal proceedings, notwithstanding irregularities apparent in them. These statutes may as properly be made applicable to judicial as to ministerial proceedings; and although, when they refer to such proceedings, they may at first seem like an interference with judicial authority, yet if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, they cannot be obnoxious to the charge of usurping judicial power. The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving ⁴²⁸ them an opportunity to be heard before it; and, for the same reason, it would be incompetent for it, by retrospective legislation, to make valid any proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable: 1. As an exercise of judicial power, since, the proceedings in court being void, it would be the statute alone which would constitute an adjudication upon the rights of the parties; and 2. Because, in all judicial proceedings, notice to parties and an opportunity to defend are essential—both of which they would be deprived of in such a case. And for like reasons a statute validating proceedings had before an intruder into a judicial office, before whom no one is authorized or required to appear, and who could have jurisdiction neither of the parties nor of the subject matter, would also be void."

The weight of authority is undoubtedly against the proposition that the law-making power may validate void judgments and decrees, and we find no authority for the validation of such a decree as the one relied upon by the administrator. Authority

is against it. Some of the cases, however, fail to distinguish between void and voidable judgments. Nor do we think it can be supported on principle: *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Richards v. Rote*, 68 Pa. St. 248; *Roche v. Waters*, 72 Md. 264; *Nelson v. Rountree*, 23 Wis. 367; *Yeatman v. Day*, 79 Ky. 186; *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242.

It is claimed, however, that Congress had the power to grant the divorce in question, and could, therefore, validate this void decree by a law enacted ten years after it was framed. Congress attempted to validate judgments in criminal and civil cases which had been executed. The effect of the curative act was (if held to validate the decree ⁴²⁹ in question) to divorce the petitioner from her late husband, and make the divorce take effect ten years before it was actually granted. But Congress is a legislative body. It is not vested with judicial powers, like the British parliament and many of the states of this Union during their early history; nor has Congress ever attempted to exercise such judicial power, as some of the state legislatures, after their constitutions had partitioned the powers of the state government, and confined their functions to law-making, have. Section 1, article 1, of the United States Constitution declares that "all legislative power therein granted shall be vested in a Congress of the United States, which shall consist of a senate and house of representatives." And section 1, article 2, declares that "the executive power shall be vested in a president of the United States of America." And section 1 of article 3 of the same instrument declares "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." All the legislative power delegated to the national government is vested in Congress, except so far as the president may participate therein, in the approval of laws or by his veto; and all the executive power is vested in the president, except so far as the senate may give effect to appointments and treaties by its advice and consent; and all the judicial power delegated to the national government is vested in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish, except as the senate may use such power in impeachment trials, and in such investigations as it may make in exercising its legislative power, and in requiring witnesses to appear and testify therein. It is plain that no express or implied authority to try divorce or other causes is vested in Con-

gress, but, on the contrary, all ⁴³⁰ judicial power, except as above pointed out, is vested in the judicial department of the government.

There are decisions to the effect that the granting of a divorce may be regarded as a legislative act, and that the legislature may, without any alleged cause for divorce, and without any notice to either party or opportunity to be heard, and without any proof, by an authoritative order or fiat, grant divorces; and there is a second class of cases which hold that divorce is a judicial act in those cases upon which general laws confer on the courts authority to grant divorces for cause, and that in such cases the legislature cannot grant divorces, but that the legislature may, by special act, grant divorces for other causes. A third class of cases, however, hold that marriage secures to the respective parties legal rights which cannot be dissolved except for sufficient cause, which must be alleged, and that the other party should have notice and an opportunity to be heard; that the truth can only be ascertained by proof; that a decree of divorce can only be granted on such proof; and that such a proceeding is necessarily judicial; and, in those states whose constitutions vest all judicial power in the judicial department of the government, decrees of divorce can only be granted by courts of justice. In the case of *Higbee v. Higbee*, 4 Utah, 19, it appeared that Lyman P. Higbee, an attorney at law, residing with his wife in Idaho, sent her to California for her health, assuring her that he would follow. Soon afterward he was elected to the legislature of that territory, and he induced that body to grant him a divorce from his wife without notice to her, without her knowledge, without assigning cause for divorce, and without any proof. Afterward, he removed to the late territory of Utah, and after his death his wife, as his widow, was denied any interest in his estate by the probate court; but, ⁴³¹ on appeal to the supreme court of the territory, the legislative divorce of Idaho was held to be void, and his wife was held to be his widow, and entitled to a share of his estate. The case of *Maynard v. Hill*, 125 U. S. 190, is relied upon to establish the authority of Congress to grant a divorce and to validate the void decree in evidence. The opinion was by a divided court. It held a divorce granted by the legislature of the territory of Oregon valid. In that opinion the court, among other things, said: "It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature, which can properly be conducted by

the judicial tribunal. Yet such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act, because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual—such as the contracting by one of the parties of an incurable disease, like leprosy, or confirmed insanity, or hopeless idiocy, or a conviction of a felony—which would render the continuance of the marriage relation intolerable to the other party, and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the legislature from interfering, and putting an end to the relation, in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.”

In this it is conceded that investigations of a judicial character, to determine the propriety of dissolving the marriage relation, may be involved, and that a decree of ⁴³² divorce cannot be granted except for cause; and it was further said, when the object of the marriage relation has been defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, that no principle was perceived that should prevent the legislature from granting a divorce. It was also added that, if the act declaring the divorce should attempt to interfere with the rights of property vested in either party, a different question would be presented. Undoubtedly, legislatures should pass a general law such as they may believe the happiness and welfare of society demands, specifying causes for divorces. There was such a law in force in the territory of Utah when the divorce in question was attempted to be granted, and when the validating act was passed, and the district courts were open, with undoubted jurisdiction.

Inasmuch as the welfare of society and the happiness of the people of the state depend so largely on the family founded on marriage, and the public has an interest in its protection and maintenance, as well as the parties, some courts have gone so far as to hold the legislature may ignore the rights of the parties, and dissolve the relation, without inquiry, and without opportunity to the parties to be heard, and may disregard the rights of the husband or wife not at fault; that the legislature in that way may break up the family and set the wife and the chil-

dren adrift without any provision for support, for it is conceded that the legislature, in granting the divorce, cannot make a decree for alimony, or as to custody of children, or as to property. In effect, it is held by such cases that the legislature may, at the instance of the delinquent, or one at fault, without inquiry, strike in the dark, and break up the family, and without warning set the wife and children adrift, humiliated and disgraced, without any provision for their support or maintenance.

⁴³³ The weight of authority undoubtedly is to the effect that a divorce should not be granted except for sufficient cause; that the party complained of should have an opportunity to be heard—should have a day in court; that the decree of divorce should be upon proof; and that such a proceeding is judicial in its nature. Our conclusion is, that the trial of divorce causes should be had in courts of justice under constitutions conferring judicial power on those tribunals: *Higbee v. Higbee*, 4 Utah, 19; *Ponder v. Graham*, 4 Fla. 23; *Bryson v. Bryson*, 44 Mo. 232; *State v. Fry*, 4 Mo. *120 (81); 2 Kent's Commentaries, 13th ed., 106; *Dartmouth College v. Woodward* (Story, J.), 4 Wheat. 694; *Cooley's Constitutional Limitations*, 6th ed., 132; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *In re Handley's Estate*, 15 Utah, 212, 62 Am. St. Rep. 926; *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242. When the people of Utah formed a state government, they set the question at rest for the future in this state, by forbidding the enactment of private or special laws granting divorces.

Counsel for the decedent's estate also insist that the petitioner is estopped from claiming any interest in her late husband's estate, because of her misconduct, after the void decree, in contracting a marriage with another man, or by acting toward him for a time as though they were married. An estoppel cannot be based on a void decree or judgment. If the decree or judgment is simply voidable, a different rule may be applied. When the court has jurisdiction of the subject matter of the suit and of the parties, and the decree or judgment may be reversed or set aside for error or irregularity, if the defendant waives his right to do so by executing or accepting it, he will be estopped from denying its binding effect; but, when such judgment is void for any reason, he will not be estopped. The void decree in controversy was obtained ⁴³⁴ by the decedent when he knew he was not entitled to it. The evidence is conclusive that about a year before the divorce he married a young girl, and, in view of that

fact, his lawful wife had a complete defense to a divorce at his instance. Besides, he had deserted and abandoned his wife, and had taken her children from her under circumstances so cruel and hard as to overthrow her reason. Under such circumstances, there is no legal rule or equitable principle that would have permitted the decedent during his lifetime to be divorced from her because of her imbecility or misconduct, which his unkind and inhuman treatment brought about. Nor can his administrator or heirs rely upon it to defeat her rights as his widow. She is not responsible for the void decree, nor does it appear that she consented to it. In her forlorn, wretched, and pitiable condition she did say that she did not want a divorce, and it appears from the evidence that from that day she has been incapable of forming a rational conclusion with respect to the consequences and effects of her own actions. When her husband was the subject of conversation, her feelings and emotions overwhelmed her reason.

The disastrous consequences suggested that may follow a judgment of this court holding the decree of divorce in question of no effect, notwithstanding the curative act relied upon, are not likely to follow. Nearly forty years have elapsed since the last of such decrees or judgments were rendered. It will, in all probability, be found that the statute of limitations and the dispensations of time have shorn such decrees, and transactions in consequence of them, of the consequences feared by counsel, if they are now ascertained to have been void. Owing to the peculiar circumstances of this case, we are of the opinion that the petitioner's right to an estate in the decedent's ⁴³⁵ estate has survived, notwithstanding the statute of limitations and the lapse of time; and that this aged woman, with her physical and mental infirmities, is entitled, as his widow, to an interest in decedent's estate, and to whatever comfort it may afford her during the remainder of her days.

The order appealed from is reversed, and the court below is directed to recognize the petitioner as the lawful widow of the decedent, and to adjudicate the rights of the respective parties found to have an interest in his estate, and to make payment or distribution thereof, according to law.

Bartch and Miner, JJ., concur.

INSANITY — OPINION OF NONEXPERT.—A witness, not a physician, may give his opinion as to a person's insanity, when his opinion is accompanied with the reasons upon which it is founded:

Maxwell v. Harrison, 8 Ga. 61, 52 Am. Dec. 385, and note. When a nonexpert may not testify: Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123.

MARRIAGE AND DIVORCE—JURISDICTION—FOREIGN DIVORCE.—A divorce entered in another state against a resident of the state of New York in a suit in which the defendant did not appear, in which process was not served on her within the state wherein the decree was rendered, is void as against her in New York: Atherton v. Atherton, 155 N. Y. 129, 63 Am. St. Rep. 650; McCreery v. Davis, 44 S. C. 195, 51 Am. St. Rep. 794; DeMeli v. De Meli, 120 N. Y. 485, 17 Am. St. Rep. 652; monographic note to Tolen v. Tolen, 21 Am. Dec. 747.

JUDGMENT—ESTOPPEL.—A judgment is conclusive as an estoppel, though it is subject to be opened on an application to let in a defense, so long as it stands unopened: Stevens v. Reynolds, 143 Ind. 467, 52 Am. St. Rep. 422. A judgment, though clearly erroneous, is conclusive as an estoppel: People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186. However, nothing but a valid judgment will operate as an estoppel upon anyone: Springer v. Shavender, 118 N. C. 33, 54 Am. St. Rep. 708. See, also, Hodson v. Union Pac. Ry. Co. 14 Utah, 402, 60 Am. St. Rep. 902.

JUDGMENTS—VOID—COLLATERAL ATTACK.—A judgment void for want of jurisdiction of the subject matter cannot conclude any person, and may be collaterally attacked: Springer v. Shavender, 118 N. C. 33, 54 Am. St. Rep. 708. On the collateral attack of judgments see the monographic note to Morrill v. Morrill, 23 Am. St. Rep. 104. A judgment is void and entirely worthless, and no one is bound to obey it, if the court pronouncing it had not jurisdiction over the subject matter of the action or of the persons sought to be bound by it: Savage v. Sternberg, 19 Wash. 679, 67 Am. St. Rep. 751; Stafford v. Gallops, 123 N. C. 19, 68 Am. St. Rep. 815.

JUDGMENTS—VALIDATING JUDICIAL PROCEEDINGS.—A retrospective statute curing defects in legal proceedings, where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds unless expressly forbidden: Note to State v. Torinus, 37 Am. Rep. 397.

CRESCENT MINING COMPANY v. SILVER KING MINING COMPANY.

[17 UTAH, 444.]

WATERS AND WATERCOURSES—PERCOLATING WATER—APPROPRIATION.—Percolating water, after passing into an underground artificial tunnel, and not naturally flowing from or into a natural stream with a well-defined channel, banks, and course, is not subject to appropriation by another while it remains in the tunnel upon the owner's land; but if the water is allowed to flow into an artificial lake upon public land it is then subject to appropriation. The appropriator does not, however, thereby acquire an easement in the tunnel nor a prescriptive right to have the water flow from the tunnel into the lake uninterruptedly and continuously, although he has continually used the water of the lake for a long period of years.

WATERS AND WATERCOURSES—PERCOLATING WATER.—The owner of the soil is entitled to the waters percolating through it. Such water is not subject to appropriation until it leaves his land.

WATERS AND WATERCOURSES—PERCOLATING WATER—APPROPRIATION.—The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating waters and subterranean streams with undefined and unknown courses and banks.

WATERS AND WATERCOURSES—PERCOLATING WATER.—If water percolates through and under the surface of the earth upon the land of one person and comes to the surface just before it empties itself upon the land of another, the owner of such land has no right to demand that such percolation shall continue.

WATERS AND WATERCOURSES—PERCOLATING WATER.—A PERSON MAY LAWFULLY DIG A WELL on his own land, though thereby he destroys the subterranean, undefined, percolating water of his adjoining neighbor's spring, and no action can be maintained therefor.

WATERS AND WATERCOURSES—PERCOLATING WATERS.—PRESCRIPTIVE RIGHT TO.—Whenever percolating water is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor.

WATERS AND WATERCOURSES—PERCOLATING WATER which has been gathered in artificial tunnels or ditches and allowed to flow from the proprietor's land to an inferior proprietor, and has been used by him a greater period of time than that allowed by the statute of limitations, does not become his by prescriptive title.

WATERS AND WATERCOURSES—PERCOLATING WATER, so long as it remains in an artificial tunnel or mining claim of the proprietor of the land, is not open to appropriation by another.

TRESPASS—INJUNCTION AGAINST.—If one who owns valuable mining property and a water supply at a considerable distance therefrom digs a trench and inserts a pipe line therein under the surface of worthless, uncultivated, and unused land of another from his water supply to his mine, covering the trench with the material taken out, and not causing the landowner any damage except nominal, the latter is not entitled to an injunction restraining the trespass, when it appears that to restrain the laying of the pipe line would cause irreparable damage to the mine-owner and destroy a large industry without any benefit to the landowner. In such case, the remedy at law being adequate the landowner must be required to resort to such remedy for the recovery of damages attending the trespass.

INJUNCTIONS—WHEN NOT GRANTED.—If the facts present no matter requiring equitable relief, and the granting of an injunction will work irreparable injury to one party with no appreciable benefit to the other, and the remedy at law is adequate to do full justice, the court should refuse to issue an injunction as not within its legitimate jurisdiction.

Moyle, Zane & Costigan and Marshall, Royle & Hempstead, for the appellants.

Dickson, Ellis & Ellis, for the respondent.

448 MINER, J. It appears from the findings of the lower court that the plaintiff in the year 1886 constructed a dam across the outlet of what is called "Thayne" or "Shadow" lake, and by this means impounded and retained the waters flowing into said lake, and, by means of a pipe line inserted into said lake, took from the unappropriated waters thereof sufficient to fill its said pipe, and carried the same to the Crescent mine, for use in carrying on the mining operations of the plaintiff; that one of the principal sources of supply of said Shadow lake or reservoir was the stream of water flowing from the Thayne or Jeanette tunnel, situated in and excavated upon the Thayne and Jeanette mining claims, the property of the defendant, and its grantors and predecessors in interest, which said stream of water was, at the date of the diversion by the plaintiff, as aforesaid, of the waters of said Shadow lake, running from said tunnel into said lake; that said Thayne or Jeanette tunnel was run upon and excavated upon mining claims and mining property owned by said defendant, and its grantors and predecessors in interest, prior to the year 1883, and prior to the diversion and use of said waters of said lake, and its natural sources of supply, by said plaintiff, which said mining claims and mining property were duly patented by the United States to the grantors and predecessors in interest of defendant **449** prior to the running and excavation of said tunnel, and prior to the appropriation of any of the waters of said lake, and its natural sources of supply; that all the water issuing from said tunnel was developed by said defendant, and its grantors and predecessors in interest, by the running and excavation of said tunnel, and that said water was first encountered in said tunnel at about seven hundred feet from its mouth, and was and is percolating water, issuing from the rocks in said patented mining claims, and said water is not from any subterranean stream, having any defined course, bed, or banks, and that the waters of said tunnel were not open to appropriation by said plaintiff or other person, excepting said defendant, and were subject to the control and ownership of said defendant, and said tunnel was an artificial watercourse, and was not a natural source of supply of said lake. The court further found that the mining claims of plaintiff over and across which the pipe line of the defendant was laid unlawfully, and a trench dug in and upon said claims unlawfully, were and are barren, rocky, uncultivated, and unused mining claims, and are

situated upon a barren, rocky, and worthless hillside, and that the digging of said trench and the laying of said pipe line did not damage said mining claim of plaintiff, or either of them, in any manner whatever, except nominally; that in the digging of said trench, and in the laying of said pipe line, said defendant did not remove any earth or material from said mining claims, and did not in any way disturb said mining claims except to dig said trench, and lay said pipe line therein, and then cover the same with the earth and material taken in digging said trench.

The first question for determination is, Did the lower court err in its conclusions of law and decree rendered in this action, wherein it found and decreed that the respondent ⁴⁵⁰ was the owner, and entitled to the exclusive use and enjoyment, of all the water issuing and flowing out of the Jeanette or Thayne tunnel, mentioned and described in the complaint and findings, so long as said water is in said tunnel, and upon the mining claims of the defendant, and is entitled to divert said water of said tunnel to such uses as it may deem fit; provided, such diversion be made upon the mining claims of defendant, and before the waters of said tunnel reach the said reservoir or lake known as "Shadow lake," from which lake appellant appropriated and carried away said waters through its pipe line to its mine. The plaintiff contends that, under such a state of facts, the court should have decreed it the right to have the water percolating into and issuing from the Thayne or Jeanette tunnel, and wholly located upon the patented land of the defendant, flow uninterruptedly into Shadow lake, located upon the land of the plaintiff, and that it was entitled to all of such waters by virtue of its alleged appropriation of the waters of said lake so formed; and that, because said plaintiff has used said waters of Shadow lake for more than seven years, it has a prescriptive right to have the same flow from said tunnel uninterruptedly and continuously into said lake.

It is not contended that the plaintiff at any time entered upon the land of the defendant, or upon said tunnel, or appropriated the waters thereof, except after the waters had been allowed to flow into the so-called "Shadow lake"; nor is it claimed that the plaintiff at any time interfered with defendant's possession or use of said water while it was still in the tunnel or in the mining claim of the defendant. Under such circumstances, could the plaintiff acquire, as against the defendant, any right in such water while it remained in the tunnel or in the mining claim of

the defendant, from ⁴⁵¹ which said waters percolated into said tunnel. The waters issuing from the artificial tunnel into the lake are found to be underground, percolating waters from the mining claim of the defendant, and not waters naturally flowing in a stream with a well-defined channel, banks, and course. Under such a state of facts, the law seems to be well settled that water percolating through the soil is not, and cannot be, distinguished from the soil itself. The owner of the soil is entitled to the waters percolating through it, and such water is not subject to appropriation. The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating water and subterranean streams, with undefined and unknown courses and banks. When water percolates through and under the surface of the earth upon land belonging to one person, and comes to the surface just before it empties itself upon the land of another, the owner of such land has no right to demand that such percolation shall continue. It is held that a person may lawfully dig a well on his own land, though thereby he destroys the subterranean, undefined, percolating water of his neighbor's spring, and no action will lie therefor: *Mosier v. Caldwell*, 7 Nev. 363; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352.

In the case of *Acton v. Blundell*, 12 Mees. & W. 324, it is said: "In the case of the running stream, the owner of the soil merely transmits the water over its surface. He receives as much from his higher neighbor as he sends down to his neighbor below. He is neither better nor worse. The level of the water remains the same. But if the man who sinks the well on his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the springs in his own soil which shall interfere with the enjoyment of the ⁴⁵² well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery, for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made." The court held that the case does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith: *Greenleaf v. Francis*, 18 Pick. 117; *Bassett v. Salisbury Mfg. Co.*, 43

N. H. 569, 82 Am. Dec. 179; Goodale v. Tuttle, 29 N. Y. 459; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Broadbent v. Ramsbotham, 11 Ex. 602; Regina v. Metropolitan Board of Works, 3 Best & S. 716; Grand Junction Canal Co. v. Shugar, 6 Ch. App. 483; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721.

If the percolating waters which collected in the tunnel were open to appropriation, as claimed by the appellant, such appropriation would clothe him with full ownership of the waters of the lake, as well as the waters in the tunnel, and deprive the defendant of the right to use them for any purpose; and, although plaintiff had asserted no dominion over the percolating waters of the mining claim or tunnel, and had not interfered with the defendant's use thereof, he would still acquire an easement in defendant's mining claim to use the water thereof as he saw fit, notwithstanding the fact that defendant did not object to an appropriation of the water by him after it had left the tunnel of the mining claim. The result of such a contention would be that plaintiff would acquire a right to compel the defendant, who had developed ⁴⁵³ and gathered the water into the tunnel for his own purposes, to suffer it to flow therefrom uninterruptedly into the lake forever; whereby plaintiff would acquire an easement and estate in the defendant's mining claim to the extent of the flow of the water, and thus destroy defendant's power to develop or use the mine for the pursuit of minerals, or any other useful purpose for which the water would be necessary. Such a rule, if established, would at once become adverse to the mining industry of the state. If, when digging a trench, a miner should strike a considerable quantity of water, and allow it to run down a canyon until he could be prepared to use it, a stranger should be allowed to appropriate and use, and thereafter the owner be compelled to keep the water running from the tunnel for his use, the owner would soon be compelled to abandon his enterprise, and lose the benefits of his labor and the product of his land. It is evident that such a rule would be unjust as applied to percolating water; but, if well founded, and applied to a case like this, the estate of the defendant would be encumbered, and held subject to this easement of the plaintiff to have the water flow into the lake continually. Again, it does not appear that the plaintiff ever had the adverse use of the water in the tunnel, but took the water after it had left the tunnel and mining claim, and passed into the lake upon the public domain, and after defendant had lost control of the same.

Such possession and user in no way interfered with the defendant or his property. It could not have maintained an action against the plaintiff for such taking and user after the water passed out of the tunnel into the lake, and no cause of action would have arisen for such user against the plaintiff. Having no cause of action against the plaintiff therefor, the statute of limitations would not commence to run until a cause of action should accrue.

⁴⁵⁴ In *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, the court said: "Percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly, the law has never gone so far as to recognize in one man a right to convert another's farm to his own use for a filter. Such a claim, if sustained, would amount to a total abrogation of the right of property. . . . Even if this right were admitted to exist, the difficulty in ascertaining the fact of its violation, as well as the extent of it, would be insurmountable. But it seems to be thought that the enjoyment of the spring by the plaintiff below and those under whom he claims, for the period of twenty-one years, gives him a right to its continued existence, although the neighboring proprietor may thereby be deprived of the chief value of his own land. This depends upon the question whether the enjoyment of the spring was such as to have invaded his neighbor's rights, so as to enable the latter to maintain an action for the injury. No man can be barred by a statute of limitations for not bringing his action within the prescribed period, until it is first shown that he had a cause of action which he could have maintained." As between plaintiff and third persons, the plaintiff, being the first person to divert the water after it left the tunnel, would have the right to its use; and the defendant's grantors could not have maintained an action against the plaintiff to prevent it from using the water, after it had permitted the water to pass from its tunnel on its land, nor could the defendant maintain such action after it had acquired title thereto. This is the basis upon which it must be determined whether the plaintiff could acquire any right to this water by prescription: *Ellis v. Duncan*, 21 Barb. 230; *Chatfield v. Wilson*, 28 Vt. 49; *New Albany etc. R. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; ⁴⁵⁵ *Frazier v. Brown*, 12 Ohio St. 294; *Trustees v. Youmans*, 50 Barb. 316, 45 N. Y. 362, 6 Am. Rep. 100; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Mosier v. Caldwell*, 7 Nev. 363; *Chase v. Silverstone*, 62 Me. 175, 16

Am. Rep. 419; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Coleman v. Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93; Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443, 37 Hun, 356.

The rule is that, whenever the stream is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor: Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Lybe's Appeal, 106 Pa. St. 626, 51 Am. Rep. 542; Buffum v. Harris, 5 R. I. 243.

It is clear that, prior to the time when the tunnel was dug upon the mining claim of the defendant, the water was percolating water, flowing, seeping, or circulating in minute particles beneath the surface thereof, without banks or defined channels, and that its course was invisible and unknown. By the construction of this tunnel, this percolating water has become an artificial stream, and has never been diverted from the defendant's land, nor its waters taken away from the defendant or its grantors. Under such circumstances, when percolating waters have been gathered into tunnels or ditches, and allowed to flow from the proprietor's land to the inferior proprietor, and have been used by him a greater period of time than that allowed by the statute of limitations, it has been held that no title by prescription has been gained. Gould on Waters, page 402, lays down the rule that: "Where an artificial watercourse is made solely to get rid of a nuisance to mines, and to enable their proprietors to get the ores lying within the mineral field drained by it, the flow of the water through that channel is, from the nature of the case, of a temporary character, ⁴⁵⁶ having its continuance only while the convenience of the mine owners requires it; and a user of the water by others for twenty years, or a longer period, affords no presumption of a grant of any right to the water in perpetuity": Wood v. Wood, 3 Ex. 746; Greatrex v. Hayward, 8 Ex. 291; Arkwright v. Gell, 5 Mees. & W. 226; Gould on Waters, sec. 225; Angell on Watercourses, sec. 206; Washburn on Easements, 367-372; Hanson v. McCue, 42 Cal. 306, 10 Am. Rep. 299; Lakeside Ditch Co. v. Crane, 80 Cal. 181; Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615; Pierre v. Fernald, 26 Me. 436, 46 Am. Dec. 573.

The case of Sullivan v. Mining Co., 11 Utah, 438, relied upon by the able counsel for the plaintiff, rests upon a different state of facts from those disclosed in this case, and is not in

conflict with the principles here laid down. In that case defendant's predecessors in interest dug a well upon the public lands of the United States, and used water therefrom, for domestic and other purposes, for nearly twenty years. Thereafter the plaintiff located a mining claim, embracing the well within its boundaries, and brought suit for trespass against the occupants of the well. The court held the grantors of the defendant having located the well on the public domain prior to the location of the plaintiff's mining claim, that, by virtue of sections 2339, 2340, of the Revised Statutes of the United States, the plaintiff located his mining claim subject to the rights of the defendant and its grantors, and expressly recognized the principles here laid down—that percolating waters belong to the owner of the soil, and that the owner could dig a well upon his own ground, and thereby dry up the well, supplied by percolating waters of his adjacent neighbor, without liability.

We conclude that section 2780 of the Compiled Laws of Utah of 1888 was intended to apply to natural watercourses having a natural source of supply, and that it does not apply to ⁴⁵⁷ percolating waters arising in the land of the owner, and carried through artificial drains, constructed by the owner, for the purpose of improving the property, or for the convenience of the owner. So long as such water remained in the tunnel, or on said mining claim of the defendant, it was not open to appropriation by the plaintiff, or any other person, except the defendant and his grantors, and was the property of said defendant, and subject to its ownership and control.

The second question for consideration is, Did the court err in its conclusions of law and decree rendered in this action, wherein it found and decreed that the plaintiff was not entitled to an injunction against the defendant for the digging of the trench and laying and maintaining the pipe line across the barren, rocky, and worthless mining claims of the plaintiff, mentioned in the complaint and findings herein, but is remitted to its action at law for said acts and damages therefor? In this case the court found that the defendant did not remove the earth, rock or soil of the plaintiff's mining claim, but simply dug a trench, and laid a pipe line therein, and covered it with the material taken out in digging the trench, and that neither the soil nor anything else was removed from the mining claim, and that said mining claim across which the trench was dug was barren, rocky, worthless, uncultivated, not used or worked, and that the pipe line and the digging of the trench did not injure said claim

in any manner whatever, and that plaintiff suffered no injury, and was not damaged in any manner, except nominally, for such trespass, and that plaintiff had an adequate remedy at law for the alleged injury. Defendant owned water necessary to run his plant, located several miles away, between which water and its mine the plaintiff owned a strip of barren, rocky, worthless, uncultivated, ⁴⁵⁸ unused land, on a barren hillside, over which, as claimed, it refused to sell a right of way, or permit the defendant to run its pipe line to its mine. It does not appear that there was any other way of reaching the mine with the water, or that any water was obtainable. Without the water, one of the largest mining industries in the state, employing hundreds of laborers, and producing hundreds of thousands of dollars' worth of mineral annually, must be closed down and cease operation. The laying of the pipe line across this barren, valueless land caused no appreciable injury to the plaintiff. The court found the damages to be nominal. No easement could be acquired by the defendant in the land without the consent of the plaintiff. To restrain the laying of the pipe line would cause defendant irreparable damage, and destroy and lay waste a mining industry of incalculable value, throw out of employment hundreds of laborers, and seriously retard and injure the people of the community and state in which the mine is located. To grant the injunction asked for would work a great and irreparable injury to the defendant, without corresponding or any benefit to the plaintiff; while to refuse it would injure neither, but leave the plaintiff to its remedy at law, where it could obtain such redress as the law should award it. Under such circumstances, the remedy at law being complete, the plaintiff should be required to resort to such remedy. The construction of this pipe line across the barren waste, under the circumstances shown in this case, was not an irreparable injury. If it was an injury at all, it was but nominal. If an injury was done to the land by laying the pipe line, the plaintiff had a complete remedy at law for the injury, and it appears the defendant is amply responsible to answer for the damages. No peculiar, present, speculative, or other ⁴⁵⁹ value is attached to the land crossed by the line. Few, if any, cases can be found where a court of equity has interfered by injunction to restrain a naked trespass, as such, without a showing that the property itself had some peculiar value, and could not admit of due recompense, or would be destroyed or irreparably injured by repeated or continued acts of trespass. In section 697 of High on Injunctions, it is

said that the foundation of the jurisdiction of courts of equity to grant injunctions rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits; and, when facts are not shown to bring the case within these conditions, the relief will be refused. Equity will not, therefore, enjoin a mere trespass to realty, as such, in the absence of any element of irreparable injury. If, therefore, the plaintiff can recover for the trespass compensation equivalent or adequate to the injury which it has sustained, such injury, in no sense of the word, can be considered irreparable.

All the adjudged cases fix the rule to be that the injury must be of that peculiar nature that it cannot be adequately compensated in damages or allowed for in money. There must be some just, equitable feature or incident to take the case out of the rule, or equity will not interfere. When the facts present no matter requiring equitable relief, and the granting of the injunction will work a wrong and irreparable injury to one party, with no appreciable benefit to the other, and the remedy at law is adequate to do full justice, the court should reject such jurisdiction as not within its legitimate province. To hold otherwise would confound all principles upon which equitable jurisdiction stands. This court has already passed upon this same question in the case of *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, and in *Crescent ⁴⁶⁰ Min. Co. v. Silver King Min. Co.*, 14 Utah, 57, adversely to the plaintiff. This cause grew out of the same acts of alleged trespass, and were parts of the same transaction, with reference to the laying of the pipe line. In the case of *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, this court held that, under the circumstances disclosed, there was no just cause to invoke the equitable interference of a court of equity to prevent a trespass consisting of laying a pipe line across the barren, rocky, uncultivated, worthless land of the plaintiff, without doing more; and that in such case the plaintiff would be remitted to his action at law for damages. In that case, quoting from *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 437, adopted and approved in *Thorn v. Sweeney*, 12 Nev. 251, the court held: "The power to grant injunctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by ordinary and technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily, it will not be exercised when the right of

the complainant is doubtful, and has not been settled at law; and, even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. It is not enough that an injury merely nominal or theoretical is apprehended, even although an action at law might be maintained for it; but, to justify the interposition of this summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. When injuries shall be regarded as irreparable at law must depend upon the circumstances of the particular case. If the injury be trivial, as by . . . raising the water of the river a few inches upon its rocky shore, doing him no appreciable or serious damage, equity would not ordinarily interfere by injunction, ⁴⁶¹ even in cases where the right has been established at law; for the power is extraordinary in its character, and is to be exercised, in general, only in cases of necessity, and when the court can see that other remedies are inadequate to do justice between the parties, and even then it is to be exercised with great care and discretion. If the granting of an injunction would necessarily cause great loss to the defendant—a loss altogether disproportionate to the injuries sustained by the plaintiff—that fact should be considered in determining whether the application should be granted; and in some cases it would justly have great weight. It has often been supposed that, when the right has been established at law, the plaintiff would be entitled to an injunction as a matter of course; and this misapprehension has arisen, probably, from the fact that, in a large number of cases, injunctions have been refused upon the express ground that the title of the plaintiff had not been established at law, leaving room for inference that if it had been so established the injunction would have been issued. This, however, is clearly not the doctrine of courts of equity, for they will not ordinarily exercise this summary and extraordinary power, when substantial justice can be done by courts of law.” The doctrine here announced is fully supported by *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *Wason v. Sanborn*, 45 N. H. 170; *Blake v. Brooklyn*, 26 Barb. 301; *Murray v. Knapp*, 42 How. Pr. 462, 62 Barb. 566; *Nicodemus v. Nicodemus*, 41 Md. 537; *Weigel v. Walsh*, 45 Mo. 560; *Bechtel v. Carslake*, 11 N. J. Eq. 244; *Catching v. Terrell*, 10 Ga. 578; *Wooding v. Malone*, 30 Ga. 980; 1 *High on Injunctions*, secs. 483, 697, 699, 701; *Eden on Injunctions*, 231; 2 *Story’s Equity Jurisprudence*, 925, 928; *Thorn v. Sweeney*, 12 Nev. 251.

The case of *Uline v. New York Cent. etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, relied upon by appellant, arose where a private owner of lots ⁴⁶² on a public street sought to recover damages against a railroad company for raising the grade of the street and sidewalks, and so shaping the streets and gutters as to pour water therefrom upon the lots into the premises and basement of plaintiff's house, thereby flooding the lots and basement, so as to render them uninhabitable, and depriving plaintiff of the rental value thereof, to his great and irreparable injury. The case of *Pappenheim v. Metropolitan etc. Ry. Co.*, 128 N. Y. 436, 26 Am. St. Rep. 486, was brought to restrain the defendant from operating an elevated railroad in front of plaintiff's premises in the city of New York, and to recover damages therefor. The case of *Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405, was brought to compel defendant to remove from six lots belonging to plaintiff stone and heavy bowlders which defendant had placed upon the surface thereof, from fourteen to eighteen feet in height, causing plaintiff great and irreparable damage and injury, and destroying the rental value and use of the premises. These, and other cases cited, present a state of facts entirely different from those shown in this case. It is plain that the object of the defendant was not to destroy or injure the plaintiff's property that could not readily be compensated in damages. Its acts were not to destroy or injure the plaintiff's property, but to preserve its own from destruction, without injury, except nominal, to the plaintiff; and it is claimed that any damages arising therefrom were offered to be paid.

The case of *Richards v. Dower*, 64 Cal. 62, relied upon by plaintiff's counsel, materially differs from the present case, in that the defendant in that case was excavating for a tunnel, and was removing the soil from the premises, and carrying it away, to the injury of the inheritance. Under such circumstances, the injunction was properly granted.

⁴⁶³ We find no error in the record. The findings and judgment of the trial court are correct. The judgment of the district court is affirmed, with costs.

Hart, district judge, concurs.

MR. JUSTICE McCARTY dissented from that part of the decision holding that plaintiff was not entitled to equitable relief restraining the defendant from maintaining its pipe line across and through plaintiff's mining claims, as it was evident to his mind that an action at law would not afford the plaintiff a complete and

adequate remedy for the wrongs complained of, for while he would in an action at law be entitled to recover for damage done prior to and up to the time of filing the complaint, yet the judgment would be no protection against defendant continuing the trespass: *Uline v. New York Cent. etc. R. R. Co.*, 101 N. Y. 98, 53 Am. Rep. 123, 54 Am. Rep. 661; *Pappenheim v. Metropolitan Elevated Ry. Co.*, 128 N. Y. 436, 26 Am. St. Rep. 486. To deny the plaintiff equitable relief would force him to a multiplicity of suits or to the abandonment of his property: *Uline v. New York Cent. etc. R. R. Co.*, 101 N. Y. 98, 53 Am. Rep. 123, 54 Am. Rep. 661. "The right to injunctive relief in cases of trespass, when the plaintiff's title, possession, and right of possession of the property are admitted or established, does not depend on the amount and the extent of the damage done or suffered in each particular case, but depends more upon the nature and character of the trespass. This doctrine is invoked and followed in the case of *Richards v. Dower*, 64 Cal. 62, which was an action for an injunction against the construction of a tunnel through plaintiff's lot, and twenty feet below the surface thereof. The court found: 'That said tunnel has not affected, and will not if completed affect, injuriously or otherwise, the surface ground of plaintiff's said lot; that the driving of the tunnel was not, and will not, if completed, cause the plaintiff irreparable injury, or injure said lot in any way, and that the defendant is not insolvent.' The court dissolved the preliminary injunction, and ordered judgment for the defendant. On appeal, the supreme court said: 'The findings show that the tunnel which the defendant is constructing through the plaintiff's land is of a permanent character. It disturbs the plaintiff's possession, and, if permitted to continue, will ripen into an easement. This, of itself, is sufficient to entitle him to an injunction: *Poirier v. Fetter*, 20 Kan. 47; *Johnson v. Rochester*, 13 Hun, 285; *Williams v. Railroad Co.*, 16 N. Y. 97, 69 Am. Dec. 651. . . . In 3 *Pomeroy's Equity Jurisprudence*, sec. 1357, the learned author says: 'If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may, therefore, be adequate for each single act if it stood alone, and also the entire wrong may be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions, . . . the ultimate criterion is the inadequacy of the legal remedy. . . . It is certain that many trespasses are now enjoined, which, if committed, would fall far short of destroying the property, or of rendering its restoration to its original condition impossible. The injunction is granted, not merely because the injury is essentially destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages.' This doctrine is supported by the following authorities: 1 *High on Injunctions*, 702; 1 *Beach on Modern Equity Jurisprudence*, sec. 2; *Richards v. Dower*, 64 Cal. 62; *Walker v. Emerson*, 89 Cal. 450; *Shepard v. Railway Co.*, 117 N. Y. 442; *Mudge v. Salisbury*, 110 N. Y. 413; *Wheelock*

v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405; Mills v. New Orleans Seed Co., 65 Miss. 391, 7 Am. St. Rep. 671, and note; Connole v. Mining Co., 20 Mont. 523; Williams v. Railroad Co., 16 N. Y. 97, 69 Am. Dec. 651; Poirier v. Fetter, 20 Kan. 47; Miller v. Lynch, 149 Pa. St. 460; Johnson v. Rochester, 13 Hun, 285; Valentine v. Schreiber, 38 N. Y. Supp. 417, 3 N. Y. App. Div. 235.

WATERS—PERCOLATING WATERS—WHAT LAW GOVERNS—APPROPRIATION—PRESCRIPTION.—The principles of law which govern the right to waters flowing upon the surface of the earth are inapplicable to waters which are beneath its surface and percolate through the soil: Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201. Percolating waters are parts of the earth itself, as much as the soil and stones, with the same absolute right of use and appropriation by the owner of the land. Hence a proprietor of adjoining lands cannot complain of a diversion of such waters: Wheelock v. Jacobs, 70 Vt. 162, 67 Am. St. Rep. 659; Metcalf v. Nelson, 8 S. Dak. 87, 59 Am. St. Rep. 746. The owner of land through which subsurface water, without any distinct, definite, and known channel, percolates or filters to the land of another, is not prohibited from digging into his land and appropriating the water to any useful purpose of his own, though by so doing the water may be entirely diverted from the land to which it would otherwise naturally pass: Tampa Water etc. Co. v. Cline, 37 Fla. 586, 53 Am. St. Rep. 262; Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201. Waters percolating through the soil belong to the owner of the freehold, and he may use them as he chooses, free from any usufructuary rights in others: Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299. Prior occupancy of water percolating in the earth gives no exclusive right as against owners of adjacent land: Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352. A prescriptive right, therefore, to percolating waters cannot be acquired: Wheelock v. Jacobs, 70 Vt. 162, 67 Am. St. Rep. 659; Sweet v. Cutts, 50 N. H. 439, 9 Am. Rep. 276, and note thereto. On the entire question of subterranean or percolating waters, see the monographic notes to Wheelock v. Jacobs, 67 Am. St. Rep. 663-772; and to Wheatley v. Baugh, 64 Am. Dec. 727-730. It will be presumed, in the absence of evidence, that a spring is formed and fed by percolating waters, rather than by the outbreak upon the surface of the earth of a subterranean stream: Metcalf v. Nelson, 8 S. Dak. 87, 59 Am. St. Rep. 746; Tampa Water etc. Co. v. Cline, 37 Fla. 586, 53 Am. St. Rep. 262.

INJUNCTION TO RESTRAIN TRESPASS.—It is not usual to issue an injunction to restrain a trespass. And the digging of a trench, and the laying of a pipeline therein, across plaintiff's land, which is rocky, barren, vacant, and comparatively valueless, is not such an irreparable injury as to justify the issuance of an injunction, where it appears that the damages, if any, are merely nominal; that the defendant is solvent and able to respond in damages; and that proceedings have been taken under the statute for condemnation: McGregor v. Silver King Min. Co., 14 Utah, 47, 60 Am. St. Rep. 883, and note thereto. See, also, Jones v. Concord etc. R. R., 67 N. H. 234, 68 Am. St. Rep. 650.

CASES
IN THE
SUPREME COURT
OF
VIRGINIA.

BURDIS v. BURDIS.

[96 VIRGINIA, 81.]

DEVISE—FAILURE OF, FOR IMPOSSIBILITY OF PERFORMANCE OF CONDITION PRECEDENT.—If a condition precedent is annexed to a devise of real estate, and its performance is or becomes impossible, the devise fails, although there is no default or laches on the part of the devisee himself.

DEVISE—IMPOSSIBILITY OF PERFORMANCE OF CONDITION SUBSEQUENT—EFFECT OF.—If a condition subsequent is annexed to a devise of real estate, and its performance becomes impossible, without the fault of the devisee, the estate is not defeated or forfeited, but the devisee will hold the property by an absolute title, as if no condition had been annexed to the devise.

WILLS—CONDITIONS PRECEDENT AND SUBSEQUENT—WHAT ARE—DISTINCTION.—There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction. The words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and, unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent.

WILLS—CONDITIONS SUBSEQUENT—IMPOSSIBILITY OF PERFORMANCE—EFFECT OF.—If a testator devises to his wife, for her life, his "homestead and five acres around the house," with the understanding that his son will support and take care of her, and that, at her death, the "homestead and land shall return to" the son "as compensation therefor," but the wife of the testator dies in his lifetime, and he makes no change in his will, the whole will, taken together, including the wish therein expressed that the son shall support and provide for his two sisters as long as they remain single, shows that the condition upon which the son is to take the estate is a condition subsequent, and not a condition

precedent, and its performance having been rendered impossible by the act of God, in the death of the wife in the lifetime of the testator, the son holds the estate by an absolute title, as if the testator had attached no condition to the devise, for the act on which the estate depends does not necessarily precede the vesting of the estate, but may accompany or follow it.

LEGACIES—DEVISES—IMPOSSIBILITY OF PERFORMANCE OF CONDITION SUBSEQUENT—EFFECT OF.—While there is a difference between a legacy and a devise where the condition is precedent, there is no difference where the condition is subsequent; but in the latter case the estate to which the condition is annexed, whether it is land or a money legacy, if the performance of the condition is rendered impossible, becomes, by that event, absolute in the devisee as well as in the legatee.

Suit brought by Burdis against Burdis and others, in which the chief question involved was the proper construction of a will. By a clause of the will, subsequent to the devise mentioned in the opinion, the testator expressed a wish that his son, Albert, would support and provide for his two sisters as long as they remained single. The testator survived his wife, but made no change in his will. There was a decree for the complainant and the defendants appealed.

Little & Little, for the appellants.

No counsel for the appellee

83 RIELY, J. Joseph Burdis devised to his wife for her life his homestead and five acres of land, with the understanding that his son, Albert, would support and take care of her, and at her death the homestead and land should return to Albert as compensation therefor.

The wife of the testator died in his lifetime, and the matter to be determined is, whether or not his son, Albert, is entitled, under these circumstances, to the homestead and land. This depends upon the question whether the condition upon which he was to have the property was a condition precedent to its vesting in him, or was a condition subsequent, the nonperformance of which would divest the estate given to him by the will. The law is clear that where a condition precedent is annexed to a devise of real estate, and its performance is or becomes impossible, the devise fails, although there be no default or laches on the part of the devisee himself: 2 Jarman on Wills, 10; 4 Kent's Commentaries, 125; 2 Minor's Institutes, 228; but if the condition is subsequent, and its performance becomes impossible, the rule is different. In that case the estate will not be defeated or forfeited, but the devisee will hold the property by an absolute

title, as if no condition had been annexed to the ⁸⁴ devise: 2 Jarman on Wills, 11; 4 Kent's Commentaries, 130; Ridgway v. Woodhouse, 7 Beav. 437; Collett v. Collett, 35 Beav. 312; McLachlan v. McLachlan, 9 Paige, 534; Martin v. Ballou, 13 Barb. 119; Livingston v. Gordon, 84 N. Y. 140; Merrill v. Emery, 10 Pick. 507; Parker v. Parker, 123 Mass. 584; Morse v. Hayden, 82 Me. 227.

There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction. The same words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and, unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent: Finlay v. King, 3 Pet. 346; Martin v. Ballou, 13 Barb. 119; 4 Kent's Commentaries, 124.

The words, "with the understanding that my son Albert will support and take care of her," in the will under construction, which are relied upon as constituting a condition of the gift to the son, are not annexed thereto, but are connected with the devise to the testator's wife. The testator owned, in addition to what he called the homestead, a tract of land of one hundred and seven acres, and the words which are coupled with the devise to the wife were manifestly assigned as a reason for the devise to her of the homestead and the five acres around it, and not as a condition of the gift to her, while the words "as compensation therefor," which are attached to the devise to the son, do not constitute so much a condition of the gift to him as show the motive for it.

But if the language referred to be in legal effect a condition of the devise to the son, there is nothing in the will that makes the support and care of the wife of the testator by their son Albert necessarily precede the vesting in him of the estate in ⁸⁵ remainder, but much to indicate the contrary. The obligation relied upon as a condition precedent was not a single act, to be done or omitted at once, but a continuing condition, which might run through a long series of years, and require the performance of many acts.

The support and care of the wife was a continuing duty as long as she might live. If she had survived the testator she would have only been forty-five years old at the time of his death, and would have had, according to all human calculation, many years still of expectation of life. There is nothing in the will to indicate that the testator intended the devise to the son to remain in "a state of contingency" during the many years that he might have the support and care of his mother, and it would be unreasonable to believe, without an express direction or plain implication in the will to that effect, that he so intended. Although he lived more than a year after the death of his wife, he left his will unchanged. By it he also required his son to support and provide for his two sisters, the younger of whom was only fifteen years of age, as long as they might remain single, an obligation that might terminate in the lifetime of the mother, or continue long after her death. Taking the whole will together, as should be done, we are of opinion that the condition upon which the testator's son, Albert, was to take the estate was a condition subsequent, and not a condition precedent, and its performance having been rendered impossible by the act of God in the death of the wife in the lifetime of the testator, Albert holds the estate by an absolute title as if the testator had attached no condition to the devise.

In *Nunnery v. Carter*, 5 Jones Eq. 370, 78 Am. Dec. 231, the testator devised to his wife a tract of land for her life, with remainder to his son James. He also bequeathed to her certain slaves and other personal property for her life, and then "to be James Carter's, provided he take care of his mother; if not, to be whose that does take care of her." The wife in that case, as in the case at bar, died in the lifetime of the testator, and it was contended there, ⁸⁶ as it is here, that the slaves and other personal property were given to James upon a condition precedent, which, being rendered impossible by the death of the tenant for life, the property never vested in him, but remained undisposed of, and subject to be distributed as intestate property. The court, however, held that the condition, "though in form and appearance a precedent one, was, in reality and legal effect, a subsequent condition, and as such could not, by becoming an impossible one, prevent the legacy from taking effect." It is true that it was the case of a legacy, and that the subject of the present controversy is a devise. While there is a difference between a legacy and a devise where the condition is precedent, there is no difference where the condition is subsequent; but

in the latter case the estate to which the condition is annexed, whether it be land or a money legacy, if the performance of the condition be rendered impossible, becomes, by that event, absolute in the devisee as well as in the legatee: 2 Jarman on Wills, 10; Finlay v. King, 3 Pet. 346; Martin v. Ballou, 13 Barb. 119.

In *Birmingham v. Lesan*, 77 Me. 494, the testator devised to his wife all his real estate for her life, the same to go to John Mehan at her death, if any remained, provided he maintained and provided for her decently from the proceeds of the farm, or otherwise; but if he failed to provide for her, then she was empowered to call on the selectmen to provide for her in her own house. The will also provided that John Mehan should be allowed to use the farm for the purpose of maintaining himself and the testator's wife by farming the same. It was held by the court that John Mehan took the estate upon a condition subsequent, but having failed to perform the condition, the heirs, or residuary devisees, had the right to create a forfeiture by an entry for that purpose, although the will contained no clause of that purport.

There is no error in the decree appealed from, and the same must be affirmed.

Conditions Precedent and Subsequent—Impossibility of Performance.*

Generally.—As to when a condition is precedent and when subsequent is well stated in the principal case. An estate upon condition is one which is made to vest, or to be enlarged, or defeated, upon the happening or not happening of some event. The condition may be express or implied, precedent or subsequent. Conditions precedent are such as must happen before the estate dependent upon them can arise or be enlarged. Conditions subsequent are such as, when they do happen, defeat the estate: *Raley v. Umatilla Co.*, 15 Or. 172, 3 Am. St. Rep. 142. The general rule is, that a condition precedent must be literally performed before a right can accrue or an estate be vested. Thus, if, in the case of a devise, a condition becomes impossible to be performed, even though there is no default or laches on the part of the devisee himself, the devise fails, and even equity will not relieve. But the rule is different if a condition subsequent becomes impossible. In that case, the estate will not be defeated or forfeited: *Martin v. Ballou*, 13 Barb. 119, 132. "There is a wide distinction," says Mr. Justice Swayne, delivering the opinion of the court in *Davis v. Gray*, 16 Wall. 203,

*REFERENCE TO MONOGRAPHIC NOTES.

Devises and conditions in restraint of marriage: 38 Am. Dec. 156-161.

How deed may be avoided for breach of condition subsequent: 44 Am. Dec. 743-759.

When legacy will vest, notwithstanding failure to perform condition: 73 Am. Dec. 234-236.

229, "between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case, equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent," as equity can there relieve against a forfeiture. So illegal conditions subsequent are void: *Black v. Oliver*, 1 Ala. 449, 35 Am. Dec. 38; *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350; and a contract of sale executed in all other respects amounts to an absolute sale: *Black v. Oliver*, 1 Ala. 449, 35 Am. Dec. 38. If the further performance of a condition subsequent that premises should be used as a cemetery is rendered unlawful by a valid act of the legislature, the condition is thereby discharged and the title of the grantee freed therefrom: *Scoville v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350.

Senseless, repugnant, or nugatory conditions subsequent do not affect an instrument by which a right is to accrue or an estate is to vest: *Stockton v. Turner*, 7 J. J. Marsh. 192; *Case v. Dwire*, 60 Iowa, 442; *Jones v. Port Huron etc. Thresher Co.*, 171 Ill. 502; *Wead v. Gray*, 78 Mo. 59; *Kelley v. Meins*, 135 Mass. 231, 235. If a condition is subsequent, and performance is, at the time it is created, impossible, or is afterward rendered impossible, the condition is void, performance is dispensed with, and the estate vests absolutely, whether such impossibility is created by the act of God: *Hoss v. Hoss*, 140 Ind. 551; *Morse v. Hayden*, 82 Me. 227; *Parker v. Parker*, 123 Mass. 584; *Burnham v. Burnham*, 79 Wis. 557, 567; or of the law: *Mahoning Co. v. Young*, 59 Fed. Rep. 96, 16 U. S. App. 253, 277; *Burnham v. Burnham*, 79 Wis. 557, 567; or of the act of the grantor: *Elkhart etc. Co. v. Ellis*, 113 Ind. 215, 218; *Burnham v. Burnham*, 79 Wis. 566; *Vanderslice v. Hanks*, 3 Cal. 27, 40. Conditions subsequent in a deed are strictly construed, as they tend to defeat or destroy estates, and are rarely enforced in equity so as to defeat an estate for a breach thereof: See monographic note to *Cross v. Carson*, 44 Am. Dec. 744, showing how a deed may be avoided for breach of condition subsequent: *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 168; *Rawson v. Inhabitants*, 7 Allen, 125, 83 Am. Dec. 670; *Peden v. Chicago etc. Ry. Co.*, 73 Iowa, 328; 5 Am. St. Rep. 680. So with a condition subsequent in a will: *Ridgway v. Woodhouse*, 7 Beav. 437, 443. If the condition which is to divest an estate becomes impossible, by the act of God, the condition is discharged: *McLachlan v. McLachlan*, 9 Paige, 534.

If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispenses with, or by any act of his own prevents, the performance the opposite party is excused from proving a strict compliance with the condition: *Williams v. United States Bank*, 2 Pet. 96, 102; *Seymour v. Bennet*, 14 Mass. 266; *Cooper v. Mowry*, 16 Mass. 5, 7; *Clendennen v. Paulsel*, 3 Mo. (230) 166. A party to a contract, who prevents the performance of any condition, can neither claim a bene-

fit nor escape liability from the failure of such condition: *Dill v. Pope*, 29 Kan. 289. One who prevents the performance of a condition, or makes it impossible by his own act, cannot take advantage of the nonperformance: *Cape Fear Nav. Co. v. Wilcox*, 7 Jones, 481; 78 Am. Dec. 260. It always excuses the performance of a condition precedent in a contract that the performance was hindered by the other party: *Camp v. Barker*, 21 Vt. 469; and he who, by his own act, prevents the performance of a condition precedent cannot take advantage of its nonperformance: *Jones v. Walker*, 13 B. Mon. 163, 56 Am. Dec. 557. Whether a condition in a deed is precedent or subsequent, if the act of the party who imposed it makes its performance impossible, or unnecessary, the condition is no longer binding, and the estate conveyed by the deed, in which it is contained, is discharged therefrom: *Jones v. Chesapeake etc. R. R. Co.*, 14 W. Va. 514, 523. But if the act of a party, for whose benefit conditions precedent attach, is relied on as an excuse for nonperformance, it must be the proximate and not the remote cause of the failure to perform, and be of such a character as to render performance impossible, or induce the belief that it was waived, or, if attempted, would not be accepted: *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538, 553.

Notwithstanding the rule at law that, if a condition subsequent is possible at the time of making it, and becomes afterward impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute, a court of equity will not enforce such rule where it would be harsh and work injustice, especially where the circumstances do not call for a severe application of the rules of law upon either side. Thus, the state of Texas made a large grant of lands to a railroad company defeasible if certain things were not done within a certain time by the company; but the state plunged into the Civil War, and, by prosecuting it, confessedly rendered it impossible for the company to fulfill the conditions imposed upon it during the continuance of the war. In other words, the performance of all the conditions not performed was prevented by the state itself, and the court, after the war was over, applied the equitable principle that the conditions might still be complied with, but in such reasonable time as would put the parties in the same situation, as near as might be, as if no breach of condition had occurred: *Davis v. Gray*, 16 Wall. 203, 230. Equity may also interpose upon the breach of a condition subsequent, and relieve against a forfeiture, upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained: *Davis v. Gray*, 16 Wall. 203, 230; *Chipman v. Thompson*, Walk. Ch. 405; *Wells v. Smith*, 2 Edw. Ch. 78. Thus, a court of equity will not always enforce the forfeiture of a device for nonperformance of conditions subsequent. If the devisee accepts, and it would be inequitable or impossible to compel him to perform the conditions, a court of equity will award compensation in damages for breach of the conditions, if that is an adequate remedy: *Bird v. Hawkins*, N. J. Eq., March, 1899.

Contracts.—Whether conditions in a contract are precedent or subsequent is to be determined by the intention of the parties, as collected from the contract, whatever may be the order in which they are placed, or the manner in which they are expressed: *Finlay v. King*, 3 Pet. 346. A right depending upon a condition precedent does not accrue unless the condition is performed, although performance becomes impossible by the act of God: *Mizell v. Burnett*, 4 Jones, 249, 69 Am. Dec. 744; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Eldridge v. Rowe*, 2 Gilm. 91, 43 Am. Dec. 41; *Rives v. Baptiste*, 25 Ala. 382. Thus, a contract for the sale of an invention at a valuation price, to be fixed by persons named, is impliedly conditional upon those persons surviving and making the valuation. Hence, if they die before doing so, the contract is terminated by their death, the valuation stipulated for having thus become impossible: *Estate of Preston v. Smith*, 67 Ill. App. 613, 617, citing numerous authorities in support of the proposition that contracts for personal service, which can only be performed during the lifetime of the party contracting, are subject to the implied condition of his continuing to live and to be in health to perform them, and are terminated by his death or incapacity from illness. Stipulations in a contract are not, however, to be construed as conditions precedent, unless that construction is made necessary by the terms of the contract: *Deacon v. Blodget*, 111 Cal. 416.

One who prevents the performance or happening of a condition precedent upon which his liability, by the terms of a contract, is made to depend, cannot avail himself of its nonperformance: *Jones v. Walker*, 13 B. Mon. 163, 56 Am. Dec. 557. He cannot take advantage of his own wrong, and screen himself from payment for what was done under the contract: *Buffkin v. Baird*, 73 N. C. 283. If the performance of a condition precedent has been prevented by the defendant, the plaintiff may recover, on a general count, the value of the services he has performed: *Morford v. Ambrose*, 3 J. J. Marsh. 688, as upon a quantum meruit: *Buffkin v. Baird*, 73 N. C. 283. The general rule is, that there can be no recovery upon a quantum meruit if a condition precedent has not been performed, but if the defendant completes the contract himself, putting it out of the plaintiff's power to do so, there may be a recovery upon a quantum meruit, as if the work had been completed by the plaintiff, but not in a workmanlike manner: *Escott v. White*, 10 Bush, 169. On the other hand, in all cases where the condition of a bond or recognizance is possible at the time of making the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or the obligee, there the obligation is saved. Thus, if compliance with a sheriff's recognizance to appear on attachment becomes impossible by reason of his sickness on the day set, and his subsequent death, nonperformance is excused and no action lies: *People v. Manning*, 8 Cow. 297, 18 Am. Dec. 451.

Deeds.—If, for any reason, a condition precedent in a deed is, or becomes impossible of performance, no estate vests: *Stockton v.*

Weber, 98 Cal. 433, 441; Vanhorne v. Dorrance, 2 Dall. 304, 317; Harvey v. Aston, 1 Atk. 376. An impossible or illegal condition in a deed is void, and the grantee takes the estate freed from the condition: Raley v. Umatilla Co., 15 Or. 172, 3 Am. St. Rep. 142; note to Cross v. Carson, 44 Am. Dec. 745; Barksdale v. Elam, 30 Miss. 694. A grant in restraint of marriage is void, unless there is a valid limitation over: Randall v. Marble, 69 Me. 310, 31 Am. Rep. 281. Whether a condition is precedent or subsequent does not depend upon any precise form of words, or their place in the deed, but must be determined from the whole instrument: Rogan v. Walker, 1 Wis. 527; and the intention of the parties: Shinn v. Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Underhill v. Saratoga etc. R. R. Co., 20 Barb. 455. An estate which has once vested in a grantee cannot be defeated by a condition subsequent which is impossible, illegal, or repugnant to the estate granted: Ricketts v. Louisville etc. Ry. Co., 91 Ky. 221, 34 Am. St. Rep. 176. Conditions subsequent in a deed are good whenever their performance is not impossible, or does not afterward become so by the act of God, or of the grantor, and they are not contrary to law, nor repugnant to the deed; otherwise they are void, and the grantee takes an absolute estate: Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682. But the rule that a condition, reservation, or exception which is repugnant to the granting part of a deed is null and void applies only in cases where the repugnancy is such that the intention of the parties cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect in accordance with established principles of law: Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404. A condition subsequent in the form of a power of revocation reserved in a deed will not be deemed impossible of execution, on the ground that the deed provides that the revocation shall be by an instrument to be acknowledged and recorded, as in the case of a deed to land. The right of revocation is not lost merely because the grantor has thus prescribed as a part of the proceedings by which the revocation is to be carried into effect some formality which the law does not recognize. In such a case, therefore, the provision that the revocation is to be acknowledged and recorded is not to be regarded as so far of the essence or substance of the right as to defeat it: Ricketts v. Louisville etc. Ry. Co., 91 Ky. 221, 34 Am. St. Rep. 176. If the performance of a condition of a bond is prevented by the omission of the obligee, the obligor is discharged: Whitney v. Spencer, 4 Cow. 39.

Devise.—As in other cases, the question as to whether a condition in a devise is precedent or subsequent depends upon intention, that is, upon whether the testator intended that a compliance with the requisition annexed to the estate devised should be a condition of its acquisition, or merely of its retention: Birmingham v. Lesau, 77 Me. 494, 497; Reuff v. Coleman, 30 W. Va. 171; *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308. If real property is devised, subject to a condition precedent which becomes impossible of performance before the time of performance arrives, the title to it will

not vest in the devisee: See *Shockley v. Parvis*, 4 Houst. 568; *Den v. Hance*, 11 N. J. L. 244, 257; note to *Nunnery v. Carter*, 78 Am. Dec. 234; *Cassem v. Kennedy*, 147 Ill. 660, 664; *Winthrop v. McKim*, 51 How. Pr. 323, 327, though it is otherwise as to a legacy subject to a condition precedent. See the principal case and "*Legacies*," *infra*. If a devise of property depends on the performance of a condition precedent, which is not performed, and which cannot be performed, because of the intervention of death, no estate vests in the devisee: *Den v. Messenger*, 33 N. J. L. 499. If a condition subsequent, which is to divest an estate, becomes impossible, as by an act of God, the condition is discharged, and an absolute estate exists as if no condition had been imposed: See the principal case; *McLachlan v. McLachlan*, 9 Paige, 534; *Parker v. Parker*, 123 Mass. 584; *Taylor v. Mason*, 9 Wheat. 325; *Jones v. Bramblet*, 1 Scam. 276, 281. Thus, if real property and specific personal estate is devised on condition that the devisee shall provide and maintain the son of the testator until he attains his majority, this is a gift on a condition subsequent, and, if the son dies during the lifetime of the testator, the devisee will hold the property by an absolute title, as if no condition had been attached: *Morse v. Hayden*, 82 Me. 227.

So, where a condition subsequent is void for repugnancy, the devisee takes without condition: *Zillmer v. Landguth*, 94 Wis. 607; *Langdon v. Ingram*, 28 Ind. 360, 362; and, if a condition subsequent is void as against public policy, or because it is illegal, the devisee will take the estate discharged of the condition: *O'Brien v. Barkley*, 28 N. Y. Supp. 1049. Thus, a condition subsequent in a devise, placing a restraint upon marriage, is null and void: *Smythe v. Smythe*, 90 Va. 638; but conditions precedent annexed to a devise must be observed, no matter how restrictive of marriage: *Phillips v. Ferguson*, 85 Va. 509, 17 Am. St. Rep. 78.

Legacies.—If personal property is bequeathed upon a condition precedent, which becomes impossible of performance before the time of performance arrives, the title vests in the legatee, upon the death of the testator, unless it appears that the performance of the condition was the sole motive for the making of the bequest: *Nunnery v. Carter*, 5 Jones Eq. 370, 78 Am. Dec. 231; *Culin's Appeal*, 20 Pa. St. 243; but where it appears that the sole motive of making a devise of real property was that the devisee should perform a certain act as a condition precedent, the devise will lapse upon the condition becoming impossible of performance, and no title will vest in the devisee or his heirs: *Lefler v. Rowland*, Phill. Eq. 144; *Nunnery v. Carter*, 5 Jones' Eq. 370, 78 Am. Dec. 231. There is a difference between a legacy and a devise where the condition is precedent, but there is no difference where the condition is subsequent: See the principal case. A devise of land upon a condition precedent can never take effect where the condition has become, in any way, impossible to be performed. All the authorities agree in this; but, by the civil law, which on this subject has been adopted by the courts of equity, when a condition

precedent to the vesting of a legacy is impossible, the bequest is single, that is, discharged from the condition, and the legatee will be entitled as if the legacy were unconditional. An exception to this rule in relation to legacies prevails, as above stated, where the condition is the motive, or as some authors say, the sole motive of the bequest: *Lefler v. Rowland*, Phill. Eq. 143; monographic note to *Nunnery v. Carter*, 78 Am. Dec. 235, on when a legacy will vest, notwithstanding a failure to perform a condition.

If, however, a condition subsequent is annexed to a legacy, and the condition is rendered impossible by the act of God, or otherwise, the rule is the same as in the case of a devise on a condition subsequent, and the estate becomes, by such event, absolute in the legatee as well as in the devisee: See the principal case; *Merrill v. Emery*, 10 Pick. 507; *Morse v. Hayden*, 82 Me. 227; *In re Dempsey*, 55 N. Y. Supp. 427, 5 Misc. Rep. 257; note to *Nunnery v. Carter*, 78 Am. Dec. 235; *Jones v. Bramblet*, 1 Scam. 276, 281. A bequest made to executors in trust to pay the income to a specified charitable institution so long as it maintains a certain person, and, in case it maintains him for life, to pay the principal thereto, is valid and entitles the society named to the bequest upon the performance of the condition, though such person has been expelled from the institution before the testator's death. He has no right of selection while the specified institution continues ready to maintain him. The legacy is not bequeathed to him solely, and he has only an interest in it to the extent of a support for life, which consists in the performance by the society of the obligations required by the testator's will. His right, then, is not, in any sense, to the legacy, but his claim is upon the society; or, if it fails to conform to the requirements of the will, upon such other society as may be substituted in its place. The society is entitled to the income, and, in conformity with the will, must maintain such person, not from the income derived from the legacy, but out of such funds as it may have from all sources of revenue. Hence, if he refuses to return, after expulsion, and live at the institution, or to be provided for elsewhere according to the offer made to him, thus rendering it practically impossible for the society to bestow upon him the benefits intended by the legacy, it cannot affect its right to the same. The reasonable and true construction of the condition of his support is, that the testator only intended that he should be maintained there if he so desired, and that he was not absolutely bound to live there. In the latter case, however, it was not designed that his refusal, which renders a strict performance impossible, should deprive the society of the legacy. His maintenance is a condition to be performed after the acceptance of the bequest. It is a condition subsequent, and when it becomes impossible to perform it, the estate is not defeated or forfeited, but continues as if no condition was attached: *Livingston v. Gordon*, 84 N. Y. 136, 142.

If a condition is subsequent, the estate vests in the donee immediately after the will takes effect. If it is a bequest of personalty, the vesting is absolute. If it is a devise of realty, the title will

divest upon the happening of the contingency. But if the condition subsequent becomes impossible, then the title does not divest, but becomes absolute: Note to Nunnery v. Carter, 78 Am. Dec. 235. Thus, if a testator bequeathes certain property to K., on condition that K. marries a daughter of the testator's sister, T., and T. has no daughter, the condition is one subsequent, and, as it is not capable of being performed, the devise vests in the donee at the testator's death, and does not divest: Note to Nunnery v. Carter, 78 Am. Dec. 235. A legacy given to a person, though payable at a future time, vests immediately, but if it is not given until a stated time in the future, or, if time is annexed not to the payment only, but to the gift itself, the legacy does not vest until that time. Hence, if the legatee dies before the time, the gift is lost: In re Rogers, 94 Cal. 526. If a wife, after providing a support for life for her husband from the income of her property, and, if necessary, to use her entire estate, bequeaths a certain portion of the residue to his niece, in consideration of her care and maintenance of the testatrix and her husband during their natural lives, such provision is not, in terms, a condition, but rather it has been held, an expression of the reason or inducement for the legacy, which vests on the death of the testatrix, subject to be divested in the event of the entire estate being required for the support of the husband: McCarty v. Fish, 87 Mich. 48, 58.

An illegal condition subsequent, or one opposed to public policy, or which is repugnant to the legacy to which it is attached, is void and the legatee takes the property absolutely: Ridgway v. Woodhouse, 7 Beav. 437, 443; In re Walkerly, 108 Cal. 627, 645, 49 Am. St. Rep. 97, 104; In re Elliot, L. R. (1896) 2 Ch. 353. Thus, in the case of a present gift, vesting immediately, if the condition deferring the time of its payment is repugnant to it as being impossible upon its face, the condition is void: In re Walkerly, 108 Cal. 627, 645, 49 Am. St. Rep. 97, 104. For an extended discussion of conditions precedent and subsequent in restraint of marriage, as applied to devises and legacies, see the monographic note to Coppage v. Alexander, 38 Am. Dec. 160, on devises and conditions in restraint of marriage. If a bequest is made upon condition that the legatee shall marry with the consent of her mother, it is a condition subsequent, and, if she marries without the consent of her mother, the latter being dead at the time, the performance of the condition is excused, because it was rendered impossible by the act of God, and the legatee takes a vested interest: Collett v. Collett, 35 Beav. 312.

Pardons.—A pardon may impose any condition that the governor thinks proper, provided it is neither immoral, impossible, nor illegal: State v. Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582; Lee v. Murphy, 22 Gratt. 789, 12 Am. Rep. 563. A pardon on condition that the prisoner take up and maintain his residence out of the state during the balance of his life does not impose any impossible, immoral, or illegal condition. Such condition is therefore valid: State v. Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582. The condition im-

posed may be one precedent or subsequent, and it lies on the grantee to perform it. If he does not, the pardon, in case of a condition precedent, does not take effect; and, in case of a condition subsequent, the pardon becomes null: *Flavell's case*, 8 Watts & S. 197, 199. A pardon does not take effect if upon a condition precedent, impossible to be performed: *State v. McIntire*, 1 Jones, 1, 59 Am. Dec. 566.

WILSON v. HUNDLEY.

[96 VIRGINIA, 96.]

CONTRACTS PROCURED BY FRAUD—RIGHTS AND REMEDIES OF PARTY DEFRAUDED.—A contract induced by fraud is not void, but voidable at the option of the party injured by the fraud. Upon its discovery he has, as a general rule, the choice of two remedies: 1. He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given; or, if he has not paid or given anything, repudiate the contract, and rely, when sued, upon the fraud as a complete defense; 2. He may elect to retain what he has received under the contract, and bring an action to recover damages for the injury he has sustained from the deceit. By adopting the latter course, he, in effect, affirms the contract, but not as made in good faith. He consents to be bound by its provisions, but does not thereby release or waive his claim for damages arising from the fraud collateral to the agreement.

CONTRACTS PROCURED BY FRAUD—RESCISSION OR AFFIRMANCE—ELECTION.—If a party who has been defrauded in the procurement of a contract elects, on discovery of the fraud, to affirm the contract, his election is final and conclusive. He has but one election to rescind, and, having once elected to affirm the contract, he cannot thereafter disaffirm it, but must abide by the decision he has made.

CONTRACTS PROCURED BY FRAUD—AFFIRMANCE—RESCISSION—NEW INCIDENTS OF SAME FRAUD.—If a contract has been procured by fraud, and the person defrauded, with knowledge of the substance of the fraud, elects to affirm the contract, he cannot subsequently, upon discovering new incidents of the same fraud, elect to rescind the contract. Knowledge of the essence of the fraud puts him to his election. The subsequent discovery of a new incident in the fraud does not confer a new right to rescind, but merely confirms the previous knowledge of the same fraud.

CORPORATIONS—FICTITIOUS SUBSCRIPTIONS TO STOCK—VALIDITY OF FRAUD.—Fictitious or colorable subscriptions to stock, made and used with the intent to induce other persons to subscribe, with the secret understanding that no liability shall attach to them by reason of their subscriptions, and that they shall thereafter be allowed to withdraw them, do not operate as a fraud upon bona fide subscribers, for they are as valid and binding upon the subscribers as if they had been originally made in good faith, and will be upheld and so treated by the courts. Hence,

such subscriptions do not give a bona fide subscriber a right to avoid his subscription.

JOINT STOCK COMPANIES—SUBSCRIPTION TO STOCK INDUCED BY FRAUD—ACTION FOR DAMAGES—INAPPLICABILITY OF GENERAL RULE.—The general rule that a person who has been induced by fraud to enter into a contract pertaining to goods and chattels may, upon the discovery of the fraud, elect to retain what he has received and bring an action to recover any damages he has sustained by reason of the fraud, does not apply to subscriptions for stock in a joint stock company, for such an action is at variance with the contract entered into by the subscriber.

JOINT STOCK COMPANIES—SUBSCRIPTION TO STOCK INDUCED BY FRAUD—REMEDY OF SUBSCRIBER IN ABSENCE OF RIGHT OF RESCISSION.—If a person has been induced by the fraudulent representations of an agent of a joint stock company to take shares therein, and the shareholder is debarred from a rescission of his contract by the insolvency of the company, or from any other cause, he is without remedy against the company, and is left to his action against the agent who so induced him to subscribe.

JOINT STOCK COMPANIES—SUBSCRIPTION TO STOCK—NATURE OF, THOUGH INDUCED BY FRAUD—ACTION FOR DAMAGES.—A subscription to the capital stock of a joint stock company is not only an undertaking to the company, but with all other subscribers, and it is of the essence of the contract between the shareholders that they shall all contribute ratably to the payment of the company's debts and liabilities. Hence, a shareholder who was induced by the fraudulent representations of an agent of the company to take shares in it, cannot, after he discovers the fraud, elect to retain the shares and sue the company for damages, as this would throw the burden of the payment of the debts and liabilities on the other shareholders, who are as innocent of the fraud as he is.

A WRIT OF ERROR MUST BE DECIDED according to the law as it was at the time the judgment was rendered, without any consideration of subsequent acts.

Assumpsit brought by Wilson against Hundley, to recover the balance due on a stock subscription. The defendant set up fraud in the procurement of the subscription, and attempted to maintain a cross-action against the company for damages for the deceit. Hundley prevailed, and Wilson sued out a writ of error.

B. B. Munford and S. S. P. Patteson, for the plaintiff in error.

James Lyons, George J. Hundley, and W. W. Henry, for the defendant in error.

⁹⁸ **RIELY, J.** In the summer of 1890 George J. Hundley, the defendant in error, subscribed for 500 shares of the capital stock of the Rivermont Company, of the par value of \$10 per share, to be paid for in installments upon the call of the board of directors. On August 7, 1890, he made the first payment of

\$1,000, and on November 24, 1890, he made the second payment of \$1,000, in pursuance of the second call of \$2 per share, but made default in the payment of the three remaining calls of \$1,000 each.

On June 2, 1893, the company made an assignment of all its assets, including unpaid subscriptions to its stock, to William V. Wilson, Jr., the plaintiff in error, in trust for the benefit of its creditors, who brought this suit to recover from the said Hundley the balance due on his subscription. Against its recovery he set up the defense of fraud in the procurement of the subscription.

The fraudulent representation mainly relied upon was that Warwick & Carson, the agents of the company through whom the subscription was made, represented that certain persons, called the "Roanoke Syndicate," had subscribed to the stock of the company to the amount of \$700,000, which was nearly one-half of the whole amount of its capital stock of \$1,500,000, which representation was not true; that the "Roanoke Syndicate" only subscribed absolutely for \$150,000 of the stock, and took merely an option on \$550,000 more of the stock; and that the defendant did not learn of this misrepresentation until after he had paid the first and second calls on his subscription.

It appeared in evidence that the defendant, having heard that the "Roanoke Syndicate" had not subscribed for \$700,000 of the stock, according to the representation of Warwick & Carson, wrote, on January 20, 1891, to Charles M. Blackford, the president of the Rivermont Company, stating what he had heard as to this matter, inquiring as to its truth, and making ⁹⁹ complaint if it were true. The president replied to his letter the next day, and stated that the "Roanoke Syndicate" subscribed absolutely for \$150,000 of the stock, upon which they had paid as the calls were made, and had "an option on several hundred thousand more," which had not yet expired. Upon the receipt of the letter of the president, the defendant wrote, on January 22, 1891, to the general manager of the company as follows:

"I wrote Major Blackford that I had heard a large subscriber to the stock here say that the Roanoke people only took an option on the stock, and some seemed disposed to kick on that account. Major Blackford responded that the Roanoke people had only taken \$150,000; this leaves, I suppose, the stock taken only about \$1,000,000, and throws a heavier burden on us than we anticipated, but I don't know that it will eventually hurt us.

I hold this position, though, I am with you for good or evil, and I mean to stand by you to the best of my ability and hold up your hands. I have the utmost confidence in you and Captain Blackford. I have so far paid up my calls, hard as the time was when the last one was made. I have just received another which I did not expect, and which Warwick & Carson say is earlier than it ought to have been for us who came in later. I shall do my best to meet it; if I don't, I am willing to pay interest and secure it if required. . . . It was intimated to us that this third call would probably not be made, and I had hoped it would not. But I am with you, and shall do my best; I have faith, too, in your ultimate success."

On January 26, 1891, the defendant, in reply to a letter of the 24th of January, received from the general manager, in which it was stated that "the amount of stock sold is \$835,900, the balance is held in the treasury to meet contingencies, including the one referred to in your letter about R. Syndicate," wrote the following:

"And I can assure you that your agents here, ¹⁰⁰ Warwick & Carson, assured us all that \$700,000 had been taken by the Roanoke and Clarke & Co. syndicates, and their list shown us included that subscription, and it undoubtedly influenced me and others, as would naturally be the case. Now, you see the difference it makes is this: If that stock had actually been taken, this third call would not, in all probability, have been precipitated upon us now, for you would have had money enough. . . . I merely mention these things to show you that I am not a mere grumbler, and I mean to do my very best to advance the interest of the company, though I am surprised at these heavy calls rapidly made."

On January 29, 1891, he again wrote to the general manager, who had written to him on the 27th, and inclosed a statement showing how the moneys received had been disbursed and what the company still owed, as follows:

"Yours of the 27th, with inclosed statement, received, for which accept my thanks. I shall use it to explain matters to our Richmond friends. I think if you would send out a circular, though, it would have a good effect. Of course, there are some who are scared, and some who are reckless in their assertions. As for myself, I have the utmost confidence in the ability and integrity of the management, and make this statement to all my friends; and furthermore, if the enterprise does not make money for us, I shall lose confidence in my own judgment."

I have quoted thus fully from the letters of the defendant in error to show how unequivocally he elected, after he had acquired actual knowledge from official sources in the most direct and reliable way of the falsity of the alleged representation, to affirm his contract of subscription.

A contract induced by fraud is not void, but voidable at the option of the party injured by the fraud. Upon the discovery of the fraud, he has, as a general rule, the choice of two remedies—he may elect to rescind the contract, if he can restore what he has received in the same state or condition in which ¹⁰¹ he received it, and sue for and recover back the consideration he has paid or given, or, if he has not paid or given anything, repudiate the contract, and rely, when sued, upon the fraud as a complete defense; or he may elect to retain what he has received under the contract, and bring an action to recover damages for the injury he has sustained from the deceit. By adopting the latter course, he, in effect, affirms the contract, but not as made in good faith. He consents to be bound by its provisions, but does not thereby release or waive his claim for damages arising from the fraud collateral to the agreement: *Whitney v. Allaire*, 4 Denio, 554; 1 N. Y. 305; *Selway v. Fogg*, 5 Mees. & W. 86; *Clarke v. Dickson*, 96 Eng. Com. L. 148; *Matlock v. Reppy*, 47 Ark. 148; *Herrin v. Libbey*, 36 Me. 357; *Bacon v. Brown*, 4 Bibb. 91; *Peck v. Brewer*, 48 Ill. 55; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Gifford v. Carvill*, 29 Cal. 589; *Parker v. Marquis*, 64 Mo. 38; *Robinson v. Siple*, 129 Mo. 208; *Tiffany on Sales*, 119; and *Bishop on Contracts*, secs. 679, 685.

If, however, the party who has been defrauded, elect, on the discovery of the fraud, to affirm the contract, his election is final and conclusive. He has but one election to rescind, and, having once elected to affirm the contract, he cannot thereafter disaffirm it, but must abide by the decision he has made: *Bigelow on Fraud*, 436; *Grymes v. Sanders*, 93 U. S. 55; *Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899; *Hurt v. Miller*, 95 Va. 32; and *Hudson v. Waugh*, 93 Va. 518.

In *Ormes v. Beadel*, 1861, 30 L. J. Eq. 1, Lord Campbell said: "No case can be found to establish the doctrine that if a voidable contract is voluntarily acted upon, with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he may still avoid it, when, after abiding the event, it has turned out to his disadvantage."

The defendant contended, however, that he was not precluded from repudiating his contract of subscription by having ¹⁰² elected to affirm it after learning that the "Roanoke Syndicate" had only subscribed absolutely to \$150,000 of the stock, and taken merely an option for \$550,000 more, for the reason that the general manager, in informing him of the real nature of the subscription, withheld from him the terms of the option, and that he only learned of them some time thereafter from a member of the syndicate, and discovered the "bad judgment" displayed by the company in making such an agreement.

The substance of the fraud was the fact that the entire subscription of \$700,000 was not absolute, as had been represented, but the greater part of it was merely optional. The "Roanoke" people had simply secured the right to take \$550,000 more of the stock by a certain time, but were not bound to do so. This was the important and material matter. The defendant was only to be injuriously affected by their failure to elect to take it. It was the optional nature of the subscription that constituted the fraud, and gave to the defendant the right to rescind his contract. Knowledge subsequently acquired of the terms of the option was not the discovery of a new fraud. These were merely incidents of the same fraud, and their discovery did not revive a right of rescission that had been waived after the discovery of the essential fact that constituted the fraud. The subsequent discovery of a new incident in the fraud does not confer a new right to rescind, but merely confirms the previous knowledge of the same fraud. It is seldom that a party who is the victim of a fraud learns all its circumstances at the time he discovers the fraud. It is the fact of the fraud, as, in this case, the falsity of the representation with respect to the subscription of the "Roanoke Syndicate," which gives the right to avoid the contract, not the particular terms of the option. These do not change the essence of the fraud, nor affect the right of rescission. It was not necessary that the defendant in error should be apprised of all the incidents of the fraud before he could, by the affirmance of his contract, deprive himself of the right to rescind it. Knowledge of the ¹⁰³ fraud itself was sufficient ground for the rescission of his contract, and equally so for its affirmance: Benjamin on Sales, 2d Am. ed. by Perkins, secs. 452, 453; 1 Addison on Contracts, sec. 312; Campbell v. Fleming, 28 Eng. Com. L. 40, 1 Adol. & Ell. 40; Bach v. Tuch, 126 N. Y. 53; and Max Meadows etc. Co. v. Brady, 92 Va. 79.

The defendant claimed the right to avoid his subscription upon the further ground that he was also induced to subscribe by the representation that Byrd Warwick and Fred. S. Myers, who were well-known and prosperous business men of the city of Richmond, had each subscribed to the stock of the company to the amount of ten thousand dollars, when, in fact, they had not done so, and their subscriptions were wholly fictitious. In this contention he is not sustained by the evidence. It was proved that their subscriptions were regular, and not made upon any agreement or understanding whatever inconsistent with their import, though for some reason not appearing in the record they were subsequently allowed by the company to withdraw their subscriptions.

But if it had been shown that their subscriptions were fictitious or colorable only, and were made and used with the intent to induce other persons to subscribe, with the secret understanding that no liability should attach to them by reason of their subscriptions, or that they should thereafter be allowed to withdraw them, this could not have operated as a fraud upon the defendant or injured him, for subscriptions made under such circumstances are, in the eye of the law, as valid and binding upon the subscribers as if they had been originally made in good faith, and will be upheld and so treated by the courts: 2 Thompson on Corporations, secs. 1404-1406; 1 Morawetz on Corporations, sec. 107; Taylor on Corporations, secs. 105, 521.

The defendant having, by affirmance of his contract of subscription, precluded himself from thereafter rescinding or repudiating it, the next inquiry is whether he could maintain his cross-action against the company for damages for the deceit.

¹⁰⁴ A person who has been induced by fraud to enter into a contract may, upon the discovery of the fraud, as we have seen, elect to rescind the contract and recover back the consideration he has paid or given, if he is able to restore in an unchanged state what he has received; or he may elect to retain what he has received and bring an action to recover any damages he has sustained by reason of the fraud. This is undoubtedly the rule with respect to contracts that pertain to goods and chattels, but it has been laid down as the law by the tribunal of last resort in England, the house of lords, that a person who has been induced by the fraudulent misrepresentations of an agent of a company to take shares in it, cannot, after he discovers the fraud, elect to retain the shares and sue the company for damages.

In *Houldsworth v. Glasgow Bank*, L. R. 5 App. Cas. 317, the distinction between contracts relating to goods and chattels and contracts of subscription to shares of stock was distinctly pointed out, and it was there decided, as was foreshadowed in the previous case of *Addie v. Western Bank of Scotland*, L. R. 1 Sc. App. 146, that a shareholder, who has been induced to purchase his shares by the fraud of an agent of the company, cannot maintain an action against the company for damages for the deceit, so long as he is a member of the company, upon the ground that such an action is at variance with the contract entered into by him with his fellow shareholders or partners in becoming a member of the company. The same principle was followed in *In re Addlestone Linoleum Co.*, L. R. 37 Ch. Div. 191.

The effect of these decisions is, that if the shareholder is debarred from a rescission of his contract by the insolvency of the company, or from any other cause, he is without remedy against the company, and is left to his action against the agent who induced him by the fraudulent representation to subscribe for the stock: *Benjamin on Sales*, 6th Am. ed., secs. 705-709; *Taylor on Corporations*, sec. 523; 1 *Cook on Stock and Stockholders*, sec. 159, note.

¹⁰⁵ A subscription to the capital stock of a joint stock company is not only an undertaking to the company, but with all other subscribers. It is of the essence of the contract between the shareholders that they shall all contribute ratably to the payment of the company's debts and liabilities. The amount which each pays, or agrees to pay, for his stock is, by his contract of membership, dedicated to that end. If a subscriber, who has been induced by fraud to purchase his shares, elects after the discovery of the fraud to affirm his contract of subscription, he thereby, in effect, says: "Notwithstanding the fraud by which I was induced to become a member of the company, I shall still stand in with it, and take my chances." If he could thereafter maintain an action against the company for damages for the fraud, which, if right in principle, might go to the extent of allowing him to recover back by way of damages all that he had paid in on account of his shares, he would thereby recoup his entire loss; and, notwithstanding his election to retain his shares and to continue a member of the company, he would contribute, in fact, not one cent to the payment of the debts and liabilities. The effect, therefore, of allowing an action to be maintained by a shareholder against the company for fraud

would be to throw the burden of the payment of the debts and liabilities on the other shareholders, who are as innocent of the fraud as he—a result which would be wholly at variance with his contract of membership.

The defendant in error, in consequence of having elected to remain a member of the company, could not thereafter maintain an action against it to recover damages for the alleged fraud.

Applying the foregoing principles to the case before us, it follows that the circuit court erred in its ruling upon the instructions to be given to the jury, and also in its ruling upon the motion for a new trial.

In reaching our conclusion, the question of the constitutionality of the act of the general assembly of December 19, 1895¹⁰⁶ (Acts 1895-96, p. 25), or of the act of December 22, 1897 (Acts 1897-98, p. 16), which was much argued at the bar, was not involved, and any discussion of it would be inappropriate, even if we could consider the latter act, but which could not be done, as it was enacted several months after the rendition of the judgment, and the writ of error must be decided according to the law as it was at the time that the judgment was rendered: *Anderson v. Hygeia Hotel Co.*, 92 Va. 687.

The judgment of the circuit court must be reversed, the verdict of the jury set aside, and a new trial awarded, upon which new trial, if the evidence be the same, or substantially the same, as on the last trial, and instructions be again asked for, the jury are to be instructed in accordance with the views expressed in this opinion.

CONTRACTS PROCURED BY FRAUD—RESCISSION—DAMAGES.—If a contract has been procured from a person by fraud, he may maintain an action to recover the damages sustained by him without first rescinding the contract and offering to return the consideration received for it. Where a party has been induced by fraud to enter into an executed contract for the purchase of property, he may either rescind and recover back the consideration paid, or affirm the contract and recover damages for the fraud: *Baird v. Howard*, 51 Ohio St. 57, 46 Am. St. Rep. 550, and note.

CORPORATIONS—SUBSCRIPTIONS INDUCED BY FRAUD—REMEDY.—The general rule that contracts obtained by fraud may be avoided by the injured party applies to subscriptions to corporate stock: See monographic note to *Parker v. Thomas*, 81 Am. Dec. 401, on subscriptions to corporate stock. Fraud in procuring a subscription to the stock of a corporation entitles the subscriber to a release. But the contract entered into through fraud is voidable merely, and not absolutely void. It is valid and binding until the defrauded party elects to treat it as void. And if he fails to repudiate it before the rights of innocent third parties have intervened, their equities to treat it as valid may be superior to

his claim to avoid it: See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 824, on the liability of stockholders to creditors of corporations for corporate debts. If a subscription for shares has been obtained by fraudulent representations, it may be annulled by the subscribers at any time before other equities have intervened: *Bosher v. Richmond etc. Land Co.*, 89 Vt. 455, 37 Am. St. Rep. 879. But he must exercise reasonable care and vigilance in discovering the fraud, and, in any case, he must, upon discovery of the fraud, promptly repudiate the purchase, if he would avoid his subscription: *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, and note. One who has been induced to subscribe for corporate stock by fraudulent representations cannot recover the amount paid until the claims of creditors of the corporation are satisfied: Notes to *Bosher v. Richmond etc. Land Co.*, 37 Am. St. Rep. 887; *Parker v. Thomas*, 81 Am. Dec. 401. To avoid liability, he should, within a reasonable time after discovering the fraud, and before the rights of innocent third persons have accrued, rescind, or offer to rescind, the contract, which includes the duty to return, or offer to return, his stock to the company: *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249.

FOSTER v. COMMONWEALTH.

[96 VIRGINIA, 306.]

RAPE—ATTEMPT TO COMMIT.—A BOY UNDER FOURTEEN YEARS OF AGE is conclusively presumed to be incapable of committing the crime of rape, whatever may be the real fact. Evidence to rebut the presumption is inadmissible. He cannot, therefore, be held guilty of an attempt to commit the offense.

The plaintiff in error was adjudged to be guilty of a felony, and was sentenced to imprisonment in the penitentiary for a period of eight years.

R. H. Logan and W. W. Ballard, for the plaintiff in error.

A. J. Montague, attorney general, for the commonwealth.

306 **RIELY, J.** This case presents for decision the important question whether a boy under fourteen years of age is capable under the law of committing the crime of rape, or of the attempt to commit it. It does not appear ever to have been passed upon in this state by any court of last resort.

307 In *Law v. Commonwealth*, 75 Va. 885, 40 Am. Rep. 750, it was stated as the result of all the authorities that a boy under fourteen years of age who aids and assists another person in the commission of the offense of rape may be convicted as principal in the second degree, if it appear from all the circumstances of the case that he had a mischievous discretion, but the particular

question we are now called upon to decide was not involved in that case, and, though adverted to, the court refrained from expressing any opinion upon it.

By the common law, a boy under fourteen years of age is conclusively presumed to be incapable of committing the offense, whatever be the real fact. Evidence to rebut the presumption is inadmissible: 1 Hale's Pleas of the Crown, 630; 4 Black's Commentaries, 212; 2 Russell on Crimes, 9th ed., 1117; 2 Archbold's Criminal Pleading and Practice, 156; Rex v. Eldershaw, 3 Car. & P. 366; Rex v. Groombridge, 7 Car. & P. 582; Rex v. Phillips, 8 Car. & P. 736; Rex v. Jordan, 9 Car. & P. 118; Rex v. Brimilow, 9 Car. & P. 366; Queen v. Waite (1892), 2 Q. B. 600; Queen v. Williams (1893), 1 Q. B. 320.

In the United States the rule of the common law has not been uniformly followed. It was adhered to in *State v. Handy*, 4 Harr. (Del.) 566; *State v. Sam*, 60 N. C. 293; *Williams v. State*, 20 Fla. 777; and in *McKinney v. State*, 29 Fla. 565, 30 Am. St. Rep. 140. See, also, *Commonwealth v. Green*, 2 Pick. 380.

In *Williams v. State*, 20 Fla. 777, it was held that as there was no statute in Florida fixing the age within which a person is capable of committing the crime of rape, the rule of the common law prevailed, and that a boy under fourteen years of age could not be guilty of the offense.

In some of the other states the rule of the common law has been laid down in a modified form.

In *Williams v. State*, 14 Ohio, 222, 45 Am. Dec. 536, it was held that an infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or of an attempt to commit it; but that the presumption may be rebutted by proof that he has ³⁰⁸ arrived at puberty, and is capable of consummating the crime. This decision was made in 1846. The question was again before the court in 1878 in the case of *Hiltabiddle v. State*, 35 Ohio St. 52, 35 Am. Rep. 592, and the rule in its modified form, as laid down in *Williams v. State*, 14 Ohio, 222, 45 Am. Dec. 536, since it had stood as the law of that state for many years, was followed, but it is strongly implied in the opinion that except for the previous decision the court would have adhered to the rule of the common law.

The rule in its modified form, as adopted in *Williams v. State*, 14 Ohio, 222, 45 Am. Dec. 536, has been followed in New York, Tennessee, Kentucky, Louisiana, and Georgia: *People v. Randolph*, 2 Park. C. C. 174; *Wagoner v. State*, 5 Lea, 352, 40 Am.

Rep. 36; *Heilman v. Commonwealth*, 84 Ky. 457, 4 Am. St. Rep. 207; *State v. Jones*, 39 Ia. Ann. 935; *Gordon v. State*, 93 Ga. 531, 44 Am. St. Rep. 189. See *State v. Yeargan*, 117 N. C. 706, 36 L. R. Ann., note 203.

The American text-writers upon criminal law, so far as we have had access to them, adhere to the rule of the common law: Davis on Criminal Law, 25, 29; Minor's Synonyms of Criminal Law, 73; Wharton on Criminal Law, sec. 551; 3 Greenleaf on Evidence, sec. 215; 1 Bishop's New Criminal Law, sec. 373; 2 Bishop's New Criminal Law, sec. 1117.

The last-named author, who is universally recognized as one of the ablest and most philosophical writers upon law in this country, in his latest work on criminal law approves unqualifiedly the rule of the common law for the sake of convenience and decency, as well as for its justice, and doubts "whether physical capacity in boys below fourteen is sufficiently frequent to call for the abolition of a technical rule so well adapted as this to prevent those particular statements of indecent things which wear away the sense of the refined, placed by the Maker in the human mind as a protector of its virtue": 2 Bishop's New Criminal Law, sec. 1117.

The convention of May, 1776, which declared our separation from England, and framed the first constitution of the state, ordained that "the common law of England, all statutes or ³⁰⁹ acts of parliament made in aid of the common law prior to the fourth year of the reign of King James I, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony": 9 Hen. Stat. 127, sec. 6; 13 Hen. Stat. 23, c. 17; and 1 R. C., c. 38, 40, pp. 135, 136.

In the year 1792 so much of the ordinance of 1776 as adopted the acts of parliament of a general nature, made in aid of the common law prior to the fourth year of James I, was repealed by the legislature; but that part of the ordinance of 1776, which established the common law until it should be altered by legislative power, has never been repealed.

The revisors of the code of 1849 prepared, and the legislature adopted, the following statute, prescribing the force and effect to be given to the common law: "The common law of England,

so far as it is not repugnant to the principles of the bill of rights and constitution of this state, shall continue in force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly": Code 1849, c. 16, sec. 1. And this is, by statute, the force and effect to be given to it at the present time: Code of 1887, sec. 2.

Consequently, the common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, or has not been modified by our written law, is in full force in this state, and constitutes the rule of decision on all subjects, whether of a civil or criminal nature: See Report of revisors of code of 1849, p. 68, note.

Although, by the terms of the ordinance of 1776, the common law was adopted generally and without a qualification ³¹⁰ similar to that annexed to the adoption of the British statutes, yet it has always been considered that the same principle governs the adoption of the common law. Such of its doctrines and principles as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, are either not in force here, or must be so modified in their application as to adapt them to our condition. It is a reasonable and substantial compliance with the common law, "whose peculiar beauty is that it adapts itself to the rights of parties under every change of circumstances," rather than a literal one, which is exacted by its adoption: 1 Tucker's Commentaries, 9; *Coleman v. Moody*, 4 Hen. & M. 20, 21; *Findlay v. Smith*, 6 Munf. 148, 8 Am. Dec. 733; *Stout v. Jackson*, 2 Rand. 147; *Stokes v. Upper Appomattox Co.*, 3 Leigh, 337.

The legislature, which is the representative of the sovereign power of the people, and specially charged with the duty of making or amending laws to meet their needs, has not at any time enacted any law changing the rule of the common law with respect to the matter under consideration. The presumption from the inaction of the legislature is that it has not been found that the climate of our state, or the habits and condition of our people, require any change or modification of the rule. And, in this connection, it is significant, and tends to confirm the presumption from the inaction of the legislature, that in the judicial history of the state, extending over a period of more than a hundred years, no case drawing in question the rule of the com-

mon law in respect to the age of puberty in males can be found in any court of last resort in the state.

We are not aware of any climatic influence on our people by reason of their locality, or difference in their habits or condition, that calls for a modification of our unwritten laws as to the age of puberty, even if we were satisfied that we had the power to make it in view of the force and effect the statute ³¹¹ requires shall be given to the common law. The inconvenience, if not absolute inability, of obtaining evidence of the puberty of a boy under the age of fourteen and his capacity to commit the crime of rape, except by the exposure of his person, either voluntary or compulsory, and the questionable right of the commonwealth to obtain it by compulsion, do not invite a modification of the arbitrary rule of the common law; while the unreliable and unsatisfactory evidence of the capacity of the accused to commit the crime, when so obtained and adduced, and the statement and discussion of indecent things which must attend its introduction before the jury, would cause us to hesitate to depart from a long-established rule, which has had the sanction of the wisest judges and undergone the test of years.

The circumstances under which the evidence to establish the puberty of the accused in the case before us was obtained, together with its nature and doubtful character, are well calculated to deter any modification of the rule of the common law, unless made necessary by the social condition of our people, and required for the protection of virtue.

The accused being under fourteen years of age, and conclusively presumed to be incapable of committing the crime of rape, it logically follows, as a plain, legal deduction, that he was also incapable in law of an attempt to commit it. He could not be held to be guilty of an attempt to commit an offense which he was physically impotent to perpetrate: 1 Bishop's New Criminal Law, 746; 2 Bishop's New Criminal Law, 1136; 2 Russell on Crimes, 676; 3 Greenleaf on Evidence, sec. 215, note; State v. Sam, 60 N. C. 293, 300; Queen v. Waite, 2 Q. B. 600; Queen v. Williams, 1 Q. B. 320.

The judgment of the circuit court must be reversed, and a new trial awarded the plaintiff in error, to be had in accordance with the views expressed in the foregoing opinion.

RAPE—ATTEMPT TO COMMIT—CAPACITY OF DEFENDANT.—By the common law, a boy under fourteen years of age can-

not be convicted of rape. He is presumed to be physically incapable of committing the crime. Hence, he cannot be convicted of assault with intent to commit rape until the state proves his capacity to commit rape: *Gordon v. State*, 93 Ga. 531, 44 Am. St. Rep. 189. Evidence is inadmissible, at common law, to show that, in point of fact, he can commit the offense, but, in some of our states, the presumption of incapacity may be overcome by proof that, in point of fact, he has arrived at the age of puberty: *McKinny v. State*, 29 Fla. 565, 30 Am. St. Rep. 140, and note.

LYNCHBURG PERPETUAL BUILDING AND LOAN COMPANY v. FELLERS.

[96 VIRGINIA, 337.]

LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—PREJUDICIAL ACT WITH NOTICE OF EQUITIES.—When a person buys part of a tract of land, with full notice or knowledge of a deed of trust on the whole of it, he must, in order to prevent the land so purchased from being subjected to the payment of such lien, show that the holder thereof has, with notice of his equities, done some act to his prejudice.

LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—ASSUMPTION OF TRUST DEBT—RESCISSION—BURDEN OF PROOF.—If one executes to a loan company a deed of trust on the whole of certain land to secure a loan, and then sells part of the property to a church, which assumes the payment of the loan, one who subsequently buys another portion of the land must, if he would prevent it from being subjected to the lien of the trust deed, on the ground that the contract to assume the payment of the trust debt has been rescinded, assume the burden of proving that the loan company assented to the rescission of the contract.

LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—ORDER OF—RELEASE OF PRIMARY SECURITY—EFFECT OF.—If a person executes a trust deed to a loan company on the whole of certain land to secure a loan, and then sells part of the property to a church, which assumes the payment of the loan, but subsequently sells other portions of the land, at different times, to two other persons, and then rescinds the contract by which the trustees of the church assumed to pay the trust debt, after which the loan company, with notice of the last purchasers' interest in the property embraced in the trust deed, but without notice of such rescission, releases the church property from the lien of the trust deed, the property last purchased is not absolutely released from the lien of the trust deed, but only discharged from an amount of the trust deed debt equal to the value of the parcel released so far as the proceeds of that parcel have not been applied to the payment of the lien, because the injury done to the last purchaser by the release was the difference between the value of the property released and what was actually paid out of its proceeds, or on account of it, upon the lien. That part of the land still owned by the grantor should be first

subjected to the payment of the loan company's debt, and, if the proceeds of the last purchaser's lot is not sufficient to satisfy that portion of the loan company's debt chargeable upon it, the next preceding lot, in order of alienation, is liable, and this lot will also be chargeable with that portion of the loan company's debt from which the last purchaser's lot was discharged by the release of the church lot from the lien of the deed of trust.

LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—RELEASE OF PRIMARY SECURITY—GENERAL RULE—EXCEPTION.—Ordinarily, when the equities of the various owners of lands subject to a deed of trust are unequal, so that their respective parcels are liable, in the inverse order of their alienation, if the deed of trust creditor, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases those parcels which are subsequently liable, in the order of their several liabilities, from an amount of the deed of trust debt equal to the value of the parcel released; but this effect of the release may be obviated by the conduct of the parties to be affected. Thus, if a whole tract of land is covered by a trust deed to secure a debt, and the trust deed creditor releases the trust deed lien, without notice of the rights and interests of one who had purchased a parcel of the land subject to the deed of trust, such purchaser cannot claim the benefit of the general rule where he had notice of all the facts constituting the release.

DEEDS—REGISTRY OF, BY SUBSEQUENT PURCHASER, AS NOTICE—OBJECT OF REGISTRY LAWS.—The registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered, for registry laws are not intended to affect the holders of antecedent rights, but only such persons as are compelled to search the records in order to protect their own interests.

Suit in chancery brought by the appellees, M. L. Fellers and others, against the Lynchburg Perpetual Building and Loan Company. The facts are quite fully stated in the opinion. A part of Huff's tract of land was vacant. He executed the deed of trust on the entire tract to secure his debt to the loan company, and sold a vacant lot to the trustees of the church, executing and delivering to them a deed therefor. Huff's deed to Strickler was not put of record until September 8, 1891, and his deed to Fellers was put of record on June 4, 1892. Strickler and Fellers both paid for their lots in full, and the church paid in full for its repurchase. The loan company had no actual notice of the conveyance to Strickler. There was no direct proof that the loan company had any knowledge of the rescission of the original contract between Huff and the trustees of the church, but it was sought to charge the company with such knowledge by reason of the knowledge of John W. Woods, its counsel in Roanoke. It sufficiently appeared, however, that whatever knowledge he had was acquired after the termination of his duties in respect to that transaction, and in reference to

a matter in which he was not the agent of the company. The loan company appealed from the decree, the nature of which appears in the opinion.

Moomaw & Woods, for the appellant.

Scott & Staples, Hansbrough & Hall, Josiah Friend, and S. Hamilton Graves, for the appellees.

339 BUCHANAN, J. In February, 1891, W. B. Huff, who was the owner of a lot **340** of land in the city of Roanoke, on which there were three houses, executed a deed of trust to secure the payment of the sum of \$2,000, which he had borrowed from the appellant. In July following, Huff sold and conveyed a part of the lot to the trustees of the United Brethren Church for \$2,600. They paid \$600 in cash, and assumed, it is alleged, payment of the debt due the appellant. At or about the same time Huff sold and conveyed another portion of the lot, with a house on it, to W. H. Strickler, one of the trustees of the church.

In November of the same year M. L. Fellers purchased from Huff another portion of the lot, upon which the other two houses were located, and received a conveyance therefor. The trustees of the church, after paying three monthly instalments (July, August, and September) of \$42.94 each, upon the debt secured by the deed of trust, notified Huff that they could not, and would not, proceed further with their purchase. Between that time and November, 1892 (precisely when does not clearly appear), Huff and the church trustees agreed to rescind the contract between them for the sale and purchase of the lot. No reconveyance was made, but the deed from Huff to them, which had never been recorded, was destroyed. Prior to the twenty-sixth day of November, 1892, Huff agreed to sell to the trustees of the church a portion of the lot embraced in their first contract, which had been rescinded. The trustees of the church required, as a condition precedent to their purchase, that Huff should have that portion of the lot released from the lien of the deed of trust. The lien was released by the appellant by deed dated November 12, 1892, as to that portion of the lot, and on the 26th of the month Huff conveyed it to the trustees of the church.

A large part of the appellant's debt remains unpaid, and the questions presented by this record are, what property is liable for its payment, and the order in which the property liable should be subjected.

The second, third, fourth, fifth, and sixth assignments of ³⁴¹ error raise substantially the same question, viz., To what extent, if at all, had the land purchased by Fellers been released from the lien of the deed of trust by reason of the conduct of the appellant.

The conduct relied on to show that it had been absolutely released was that Huff and the trustees of the church had rescinded the contract between them of July, 1891, by which the latter had assumed the payment of the debt secured by the deed of trust, and that this rescission was with the assent of the appellant.

The burden of proving that the appellant had assented to the rescission of the contract was upon Fellers. He had purchased with full knowledge of the appellant's lien, and, in order to prevent the land so purchased from being subjected to its payment, it was necessary for him to show that the appellant, with notice of his equities, had done some act to his prejudice. The evidence does show, we think, that the appellant had notice of Fellers' purchase, or that he had an interest in the land when the appellant executed the release of November 12, 1892. After his purchase was made and the policy of insurance had expired, which had theretofore been taken out by Huff on the property for the benefit of appellant, and as a further protection to the debt secured by the deed of trust, Fellers obtained a new policy in his own name on the house on that portion of the property purchased by him. That policy was sent to the appellant by the secretary of the insurance company, accompanied by a letter dated July 7, 1892, in these words: "Please find inclosed fire insurance policy, \$1,200, in renewal of policy of W. P. Huff, expired on the 9th, on property on which you have a lien. It was the opinion of Mr. Fellers that the houses insured would not stand more insurance than \$600 each, and for that reason the amount was reduced." It is proved that it appeared from Fellers' policy of insurance that the title was in him, and that the appellant had a deed of trust upon the property. It further appears ³⁴² that, in December, 1893, after the property had been advertised for sale under the deed of trust, Fellers went to the office of appellant to see the secretary in order to get an extension of time, and whilst there he inquired if the policies of insurance had not expired, thinking that he had only taken them out for twelve months, when the secretary replied that they had not; that they were three-year policies; went to his safe and took them out, and said, "Here are the policies and deed of

trust." When asked if the appellant knew before that time that he was a purchaser of the property, he replied that he could not say that it did, as there had never been any correspondence between them, but that the facts seemed to be familiar to the secretary when he (Fellers) told him who he was.

Unexplained, and the appellant made no effort to explain them, these facts show that the company must have known, when it released the church lot from the lien of the deed of trust, that Fellers had acquired an interest in the property embraced in the deed of trust. Upon no other reasonable theory can its acceptance and retention of Fellers' policy of insurance be explained or justified. The evidence, however, does not show, in our opinion, that the appellant was a party to or knew of the rescission of the contract of July, 1891, by which the trustees of the church assumed to pay the debt secured by the deed of trust. The circuit court erred, therefore, in holding that the Fellers property was absolutely released from the lien of the deed of trust. It was only discharged from an amount of the deed of trust debt equal to the value of the parcel released so far as the proceeds of that parcel had not been applied to the payment of the lien. The injury done to Fellers by the release was the difference between the value of the property released and what was actually paid out of its proceeds, or on account of it, upon the lien.

In the event the proceeds of the Fellers lot is not sufficient to satisfy that portion of the appellant's debts chargeable upon ³⁴³ it, as hereinbefore shown, the Strickler lot will be liable, being next in order of alienation by Huff. It will also be chargeable with that portion of the debt of appellant from which the Fellers lot was discharged by the release of the church lot from the lien of the deed of trust. Ordinarily, when the equities of the various owners of lands subject to a deed of trust are unequal, so that their respective parcels are liable, in the inverse order of their alienation, if the deed of trust creditor, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases those parcels which are subsequently liable in the order of their several liabilities from an amount of the deed of trust debt equal to the value of the parcel released. But this effect of the release may be obviated by the conduct of the parties to be affected: 3 Pomeroy's Equity Jurisprudence, sec. 1226.

In this case Strickler's conduct has been such that he cannot claim the benefit of the general rule. He was one of the

trustees of the church when their first purchase was made, when that contract was rescinded, when they made their second purchase upon the condition that the lien of the deed of trust upon it should be released, and when that release was made. He was an active participant in all these various transactions between Huff and the trustees of the church, and had full knowledge of all the facts. The evidence does not show that the appellant had notice of his rights or interest in the property when it released its lien, even if notice under the facts of the case could affect the question. There is no pretense that Strickler informed the appellant of his purchase.

The registry of his deed was not notice to the appellant. It is true, we think, as stated by counsel, that this court has never passed upon that question, but it is well settled, both upon principle and authority, that the registry of a deed by a subsequent purchaser is not notice to parties who have acquired their rights before the time when the deed is registered. Neither the language nor the policy of the registry acts was ³⁴⁴ intended to affect the holders of antecedent rights, but only such persons as are compelled to search the records in order to protect their own interests: *Cheeseborough v. Millard*, 1 Johns. Ch. 409, 414, 7 Am. Dec. 494; *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741; notes to *Aldrich v. Cooper*, 1 White & Tudor's Lead. Cas. Eq., 4th Am. from 4th London ed., 307-312; 1 Jones on Mortgages, secs. 562, 372; 2 Pomeroy's Equity Jurisprudence, secs. 656, 657, 1226.

Neither is it satisfactorily shown that Judge Woods was such an agent of the appellant and acquired his knowledge of Strickler's purchase under such circumstances as that his knowledge would be notice to it.

Whether the trustees of the church, who, it is alleged, assumed payment of the appellant's debt, are personally liable for it, and, if so, whether Fellers is substituted to the appellant's rights against them or to their rights, if any, against the church property, are questions which cannot be passed upon at this time. Only two of the five or more trustees of the church who are charged with having assumed the payment of the appellant's debt are parties to this suit. They are necessary parties, and, before any decree is made affecting their rights, they should be made parties to this suit.

We are of opinion, therefore, that the decree complained of must be affirmed in so far as it fixes the amount due appellant

on its debt, and directs the vacant lot situated on the southeast corner of Franklin road and Day avenue, still owned by Huff, to be first subjected to its payment, and that in all other respects the decree must be reversed, and the cause remanded to the circuit court to be proceeded with in accordance with the views expressed in this opinion.

PRIMARY FUND FOR PAYMENT OF MORTGAGE—ORDER OF SALE OF LANDS ALIENED BY MORTGAGOR.—If the owner of mortgaged lands sells portions of them to third parties, retaining part of them himself, unless the purchaser took cum onere, the portion so remaining in the mortgagor becomes the primary fund for the payment of the mortgage, and the portions sold are liable in the inverse order of their alienation: *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491; note to *Turner v. Flennikin*, 44 Am. St. Rep. 627. The mortgagee is not bound to inquire, before releasing a portion of the land, whether any portion has been conveyed or encumbered since his lien attached; but will retain the right to have the land sold in the inverse order of alienation, unless, before giving the release, he had actual or constructive notice of such subsequent alienation or encumbrance: *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478. Where two lots are mortgaged to secure the same debt, and the mortgagor subsequently conveys one of the lots, the remaining lot is primarily liable under the mortgage: *Gaskill v. Sine*, 13 N. J. Eq. 400, 78 Am. Dec. 105.

IF A MORTGAGEE RELEASES PART OF THE MORTGAGED PREMISES AFTER OTHER PARTS HAVE BEEN SOLD, having notice of the prior sale, he thereby releases the property first sold, if the property actually released by him is of sufficient value to pay the mortgage debt: *Turner v. Flenniken*, 164 Pa. St. 469, 44 Am. St. Rep. 624. Compare *Guion v. Knapp*, 6 Paige, 35, 29 Am. Dec. 741.

THE REGISTRY LAW applies only in cases where the interest of a subsequent judgment creditor, mortgagee, or purchaser, at the time he acts, can be affected by want of notice of the unregistered instrument. It was not intended to relate to those who have no concern in the instrument when they acquire their rights. The record of a deed is constructive notice only as against subsequent purchasers and encumbrancers: Note to *Ocobock v. Baker*, 66 Am. St. Rep. 524.

NEW SOUTH BUILDING & LOAN ASSN. v. REED.

[96 VIRGINIA, 345.]

JUDGMENTS RENDERED DURING TERM HAVE EFFECT FROM FIRST DAY THEREOF—PRIORITY OF LIEN.—A judgment rendered during a term of court relates back to the first day thereof, and is a lien upon the real estate of the judgment debtor from that time. It is, therefore, a lien which has priority over a deed of trust recorded during the term, though the judgment was actually rendered after the deed of trust was recorded.

APPEAL—WHAT CANNOT BE FIRST ASSERTED ON—SUBROGATION.—A claim for affirmative relief, such as one to be subrogated to the rights of a lien creditor not made in the court below, cannot be asserted for the first time in the appellate court.

FRAUDULENT CONVEYANCE—A VOLUNTARY DEED IS NOT FRAUDULENT AS TO DEBTS AFTERWARD CREATED. A voluntary deed will not be set aside at the instance of subsequent creditors of the grantor where no fraud is shown; and creditors whose debts were created after it was made and recorded cannot subject the property thereby conveyed upon the ground that it was executed in fraud of their rights.

HUSBAND AND WIFE—IMPROVEMENTS PUT UPON THE WIFE'S SEPARATE REAL ESTATE BY HER INSOLVENT HUSBAND, in fraud of his creditors, can be followed by them on the premises where they are put, and the land may be charged, in their favor, with the value of such improvements.

HUSBAND AND WIFE—CONTROVERSY OVER FUNDS, THE WIFE'S SEPARATE ESTATE, TAKEN BY HER INSOLVENT HUSBAND—RIGHTS OF CREDITORS.—In a contest between the creditors of an insolvent husband and his wife over funds which, at one time, constituted her separate estate, but which she allowed to pass into her husband's hands, the creditors will prevail, where there is nothing to show that the transaction was intended as a loan, or that the husband and wife intended to occupy the relation of debtor and creditor in respect to such funds.

Suit to subject certain property to the payment of debts. The appellees, D. V. Reed and Margaret O. Reed, his wife, went to Roanoke, Virginia, in 1888, taking with them about \$300 belonging to D. V. Reed, the tools of his trade, and about \$1,200 of the separate estate of Mrs. Reed, derived from the sale of certain lands owned by her in West Virginia. D. V. Reed mingled this money with his own, and used it as such, with his wife's assent, and, shortly after their arrival, purchased property, in Roanoke, at the corner of Luck and Roanoke streets, on which he erected a carriage factory. On April 17, 1893, D. V. Reed conveyed this property in trust to secure to the appellant, the New South Building and Loan Association, the payment of a debt of \$4,500, for money loaned him. This deed was admitted to record on the same day. On December 6, 1894, the property was sold, under this deed of trust, to the association, for

\$2,500, which sum was credited on the debt due the association. At a term of the circuit court, beginning on April 10, 1893, two judgments were rendered against D. V. Reed—one on May 16, 1893, in favor of the Enterprise Carriage Manufacturing Company for \$140.25, and the other on May 19, 1893, in favor of the Ohio Spiral Spring Buggy Company, for \$400. Both were docketed on May 23, 1893. On April 15, 1891, George A. Baker and wife had conveyed to Mrs. Reed a lot of land in the city of Roanoke, at the corner of Mountain street and Franklin road. The deed was admitted to record on November 2, 1891. It stated a consideration of \$2,400, of which \$1,200 was paid in cash. For the remainder of the indebtedness, Mrs. Reed assumed the payment of negotiable notes aggregating \$600, and executed a negotiable note, payable to Baker, for the other \$600. All but about \$50 of the entire consideration for this property was paid. In February, 1895, the two companies which had recovered judgments against D. V. Reed, suing for themselves and all other lien creditors of D. V. Reed, filed a bill, in which D. V. Reed and the loan association were defendants, charging that the judgments mentioned were liens on the lot at the corner of Luck and Roanoke streets, from and after the first day of the term at which they were rendered, and on all the other real estate then and thereafter owned by D. V. Reed, and that the loan association acquired the property at Luck and Roanoke streets subject to the lien of the judgments named. It was also charged that the consideration for the lot conveyed to Mrs. Reed by Baker was paid by D. V. Reed, who procured the deed to the property with intent to hinder, delay, and defraud his creditors. Further allegations were made that Reed's wife had notice of his fraudulent intent; that the deed from Walker and wife to Mrs. Reed was void as to D. V. Reed's creditors; and that the judgments mentioned were liens upon the property so conveyed. The bill prayed that the property purchased by the loan association be subjected to the judgments named; and that the deed from Baker and wife to Mrs. Reed be set aside and annulled, and the property attempted to be conveyed thereby be subjected to the payment of D. V. Reed's debts. The loan association put in an answer which it prayed might be treated as a cross-bill. The association denied that the property purchased by it was subject to the judgments mentioned, and claimed to be a bona fide purchaser without notice. It contended that, if the judgments were held to be prior liens upon the property so purchased by it, D. V. Reed was the owner of

other property which should first be subjected to the payment of the judgment liens. The association joined in the prayer of the bill that the deed from Baker and wife to Mrs. Reed be set aside and annulled, and further prayed that the property conveyed thereby be subjected to the payment of the balance due it on its loan to D. V. Reed, as shown above. It also contended, in the appellate court, that as the money it loaned to D. V. Reed was used largely in paying off liens on the property at Luck and Roanoke streets, it should, to that extent, be subrogated to the rights of such prior lienholders; and that is was, consequently, entitled to priority over the judgments. The pleadings, however, did not set up this claim, and it was not asserted in the trial court. The defendant loan association, and others, appealed from the decree, the nature of which appears in the opinion. The appellants Nelson & Myers were creditors of D. V. Reed, and came into the suit by petition as parties complainant.

C. A. McHugh and John M. Hart, for the appellants.

Scott & Staples, Watts, Robertson & Robertson, and Lockett & Cosby, for the appellees.

³⁴⁸ HARRISON, J. The court is of opinion that the two judgments asserted in the original bill in this cause, one in favor of the Enterprise Carriage Manufacturing Company, and the other in favor of ³⁴⁹ the Ohio Spiral Spring Buggy Company, constitute liens upon the real estate of D. V. Reed prior in dignity to the deed of trust upon said real estate in favor of the appellant building association, dated and recorded April 17, 1893. Both of these judgments were rendered at the April term, 1893, of the circuit court for the city of Roanoke, which term began April 10, 1893. The judgments were rendered after the recordation of the deed of trust, but they operate as liens upon the real estate of the judgment debtor from the first day of the term of the court at which they were rendered. This we have seen was before the deed of trust was recorded, and hence judgments rendered at that term have priority over the deed of trust recorded during the term: Code, sec. 3567; *Hockman v. Hockman*, 93 Va. 455, 57 Am. St. Rep. 816.

The court is further of opinion that the appellant building association is not entitled to be subrogated to the liens existing upon the real estate of D. V. Reed at the time its loan was made, and upon which said loan was secured. This claim for

subrogation is for affirmative relief. It was never made in the court below, but is suggested for the first time in the closing brief of counsel for appellant, filed a few days before the case was called for argument in this court. The cause was not conducted in the court below with reference to the contention now made as a means of relief, and, even if it was proper to allow parties to be surprised by a new case made here for the first time, the evidence furnished no basis for the relief asked.

The court is further of opinion that the deed of April 15, 1891, from George A. Baker and wife, conveying to Mrs. M. O. Reed a certain lot of land in the city of Roanoke, on the corner of Mountain street and Franklin road, was not made at the instance of D. V. Reed, the husband of the grantee, with intent to hinder, delay, and defraud his creditors. The evidence shows that, at the time of this conveyance, D. V. Reed had ample property to pay his debts, and that its execution in no way prejudiced any creditor of D. V. Reed whose debt existed ³⁵⁰ at the time it was made. Nor is there any evidence or circumstance tending to show that the deed in question was intended to prejudice the rights of subsequent creditors of D. V. Reed. The deed was merely voluntary, and the appellants, whose debts were created after it was made and recorded, cannot subject the property thereby conveyed upon the ground that it was executed in fraud of their rights: Code, sec. 2459; *Rose v. Brown*, 11 W. Va. 122; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

The court is further of opinion that D. V. Reed, having created the debts due to the appellants, could not thereafter lawfully divert his estate to the payment of purchase money due from his wife on her separate real estate, or to the cost of improving said real estate, leaving his own debts unpaid, and without the means of payment. It is well settled that improvements put upon the wife's separate realty by the husband, in fraud of creditors, can be followed by the creditors on the premises where they are put, and the realty can, in favor of the creditors, be charged with the value of such improvements. It would be contrary to the plainest principles of right and justice to permit an insolvent husband to divert his means, and invest it in improving his wife's separate estate, which is not liable to his debts, and thus defeat the demands of his creditors: *Rose v. Brown*, 11 W. Va. 122; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242; *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664.

The contention on behalf of Mrs. Reed that the balance of purchase money on her lot, and the cost of improving the same,

was paid by D. V. Reed with separate estate in his hands belonging to her, is not sustained by the evidence. It appears that about the year 1888 the proceeds of certain real estate in West Virginia belonging to Mrs. Reed, amounting to about \$1,200, passed into the hands of D. V. Reed, without anything to show that it was intended as a loan, or that the husband and wife intended to occupy the relation of debtor and creditor in respect thereto. Under such circumstances the wife cannot prevail against the creditors of the husband: *Spence v. Repass*, 94 Va. 716.

351 Admitting, however, that D. V. Reed was under obligation to account to his wife for this fund, as debtor to her separate estate, it is shown that all obligation on this account was more than discharged by the conveyance to Mrs. Reed, and the subsequent improvement of certain real estate in the city of Roanoke, not in controversy in this case, and by the payment for her, prior to the creation of the debts due appellants, of a large part of the purchase money for the lot in question.

The court is further of opinion that the record does not show, with sufficient clearness to form the basis of a decree, what amount was paid by D. V. Reed, after the creation of the debts due to appellants in discharge of unsatisfied purchase money due on the house and lot in question belonging to Mrs. Reed, or what sum was paid by him, after that date, in discharge of the outstanding cost of making improvements upon said lot. The cause ought to have been recommitted to a commissioner, and these facts ascertained and reported to the court, and, when correctly determined, a decree entered, charging the property in question with the amount thus shown to have been diverted by D. V. Reed from the just claims of his creditors.

The lower court having held that there was no charge upon the house and lot belonging to Mrs. Reed, situated on the corner of Mountain street and Franklin road, in the city of Roanoke, in favor of appellants, its decree must in this respect be reversed and set aside, and in all other respects affirmed, and the cause remanded to the Hustings court for the city of Roanoke for further proceedings to be had in accordance with the views expressed in this opinion.

JUDGMENT LIEN ATTACHES, WHEN—FIRST DAY OF TERM—PRIORITY—The lien of a judgment, deemed under the statute to have been entered on the first day of the term of the court at which it was recovered, begins with the first moment of the day on which it attaches, irrespective of the hour at which the entry was in fact made, and such lien overreaches deeds of trust

or other encumbrances filed for record subsequent to such time, although the indorsement of the clerk shows that the judgment was, in fact, entered after such deeds or other encumbrances were filed for record: Note to Ocobock v. Baker, 66 Am. St. Rep. 523.

APPEAL—WHAT CANNOT BE FIRST ASSERTED ON.—A question not raised at the trial will not be considered for the first time on appeal: Reich v. Cochran, 151 N. Y. 122, 56 Am. St. Rep. 607; State v. Myers, 70 Minn. 179, 68 Am. St. Rep. 521.

FRAUDULENT CONVEYANCES—VOLUNTARY DEED.—A voluntary conveyance is not, as against subsequent creditors, fraudulent or void, though the grantor was indebted at the time it was executed: Note to Gilliland v. Jones, 55 Am. St. Rep. 216. A fraudulent intent must be established to set it aside as to them: Cole v. Brown, 114 Mich. 396, 68 Am. St. Rep. 491.

HUSBAND AND WIFE—INSOLVENCY OF HUSBAND—USE OF WIFE'S MONEY BY HIM—RIGHTS OF CREDITORS.—When a wife having money in her own right gives it to her husband for general use, without any agreement or expectation that it is a loan, and without any obligation for its repayment, the transaction cannot generally, in later years, be made the means of protecting the insolvent husband's property against his creditors. In such cases, the transaction will generally be deemed to have been made without consideration, and for the purpose of hindering, delaying or defrauding creditors: Note to O'Brien v. Stambach, 63 Am. St. Rep. 376.

HUSBAND AND WIFE—CREDITOR'S RIGHT TO FOLLOW IMPROVEMENTS PUT UPON WIFE'S LAND BY HUSBAND.—The creditors of a husband may follow additions to a wife's estate made thereon by the husband in fraud of their rights: Trefethen v. Lynam, 90 Me. 376, 60 Am. St. Rep. 271. Hence, improvements put upon her real property, in fraud of his creditors, can be followed by them on the premises where they are put; and such realty can, in favor of such creditors, be charged with the value of such improvements: Burt v. Timmons, 29 W. Va. 441, 6 Am. St. Rep. 664.

SNYDER v. GRANDSTAFF.

[96 VIRGINIA, 473.]

PLEADING—BILL IN EQUITY.—MULTIFARIOUSNESS does not arise from the presentation of different views of the same collocation of facts, but it must be two distinct collocations of distinct and different facts, each collocation presenting different rights, and calling for different relief. Hence, a bill is not multifarious because a party states his case in the alternative.

EQUITY—BILL FOR REFORMATION OF DEED—WHEN NOT DEMURRABLE.—Equity is the proper forum for the reformation of a deed and a claim, in a bill for that purpose, of a mutual mistake, prevents the bill from being demurrable, though it fails to allege notice to a purchaser for value. The complainant must, it is true, prove notice to a bona fide purchaser for value, but the defense that he had no notice must be made by plea or answer.

VENDOR AND PURCHASER—LATENT EQUITIES—MUTUAL MISTAKE.—A PURCHASER FOR VALUE is not affected

by any latent equity, whether by lien, encumbrance, trust, fraud, or any other claim; and a mutual mistake stands on the same footing as any other equity.

DEEDS—MARRIAGE AS A VALUABLE CONSIDERATION.—A deed made by a man to his intended wife, followed by marriage, is conclusively presumed to be in consideration of marriage, and is based on a valuable consideration.

DEEDS UPON CONSIDERATION OF MARRIAGE—VALIDITY OF.—Under the statute of Virginia, conveyances upon consideration of marriage are void as to existing creditors, but not as to those who claim to be paramount purchasers under a will.

VENDOR AND PURCHASER—BURDEN OF PROVING NOTICE TO PURCHASER FOR VALUE.—One who alleges that a purchaser for value had notice must assume the burden of proving it, and mere proof of confidential relations between the grantor and the grantee is insufficient.

VENDOR AND PURCHASER—NOTICE TO PURCHASER FOR VALUE—SUFFICIENCY OF.—To charge a purchaser for value with notice, it is necessary that the evidence should establish notice, either actual or constructive. Otherwise, it is insufficient.

VENDOR AND PURCHASER—AFFIRMATIONS OF TITLE.—Purchasers for value have a right to rely on the affirmations of grantors, and grantors are bound by their affirmations of title.

VENDOR AND PURCHASER—VARIANCE BETWEEN CONTRACT FOR SALE OF LAND AND DEED—PRESUMPTION—BURDEN.—In the event of a conflict between the terms of an agreement for the sale of land and a subsequent deed to it, the presumption is, that the purposes of the parties were altered, and that the deed expresses the final and true agreement between them. Hence, the burden of proof is upon him who denies that the writing speaks the final agreement to rebut this presumption by the clearest and most satisfactory evidence.

EQUITY HAS NO JURISDICTION TO CONSTRUE MUNICIMENTS OF TITLE in a case where one holds adversely to the instrument under which another claims, whether a deed or a will, for it is the province of courts of law to construe instruments which involve legal rights. Hence, the party out of possession cannot invoke the aid of a court of equity to determine who has the better right.

DEEDS—PURCHASE BY DEVISEES UNDER A WILL—CONVEYANCE TO INTENDED WIFE, FOLLOWED BY MARRIAGE—RIGHTS OF SURVIVORSHIP VESTED IN WIDOW.—When it appears that a whole estate was devised to the testator's three grandchildren, "to be equally divided between them, share and share alike, but, on the death of either of them without issue, his or her share should pass to the survivors or survivor, and, in case all died without issue, then to collateral kindred"; that the devisees afterward apportioned the estate among themselves, and each, by a deed expressly stating his intention and desire, conveyed to the others all of his right, title, and interest in the property allotted to such other; and that one of the devisees, contemplating marriage, deeded his share to his intended wife, marrying her on the same day, but died shortly afterward, without issue, or possibility of issue, it must be held that all rights of survivorship in the other two devisees passed by their deeds to the deceased, and by the latter's deed became vested in his widow.

Suit in chancery wherein L. A. Snyder and others were the complainants, and A. J. Grandstaff, and Flora Grandstaff, married to Joseph V. Snyder, were the defendants. The defendants prevailed, and the complainants appealed.

Walton & Walton, for the appellants.

Barton & Boyd, and L. Triplett, Jr., for the appellees.

475 CARDWELL, J. This is an appeal from a decree of the circuit court of Shenandoah county. In deciding the case, the learned judge of that court delivered the following opinion, which is filed with, and made a part of, the record:

"Israel Allen devised, in the third clause of his will, that after the death of his wife, his whole estate, real, personal, and mixed, should pass to his three grandchildren, L. A. Snyder, Amanda Long, and Joseph V. Snyder, to be equally divided between them, share and share alike, but, on the death of either of them without issue, his or her share should pass to the survivors, or survivor, and, in case all died without issue, then to collateral kin.

"By deed dated July 20, 1895, L. A. Snyder and wife, Amanda Long and husband (Joseph V. Snyder signing the deed as party of the second part), reciting that, under the third clause of the will, the said parties were entitled to one equal third of the estate; that they had agreed upon a partition of the real estate; that Joseph V. Snyder was to be equalized by payment to him of \$3,000 out of the personal estate; that the said parties desired 'to vest exclusive title to the several parcels of land in the said parties to whom they had been assigned and allotted respectively,' in consideration of one dollar, et cetera, conveyed unto the said Joseph V. Snyder, his heirs and assigns, 'all right, title, and interest of the said parties of the first part' in the described property.

"Similar deeds were made to each of the grantors by the other two devisees for the tracts assigned and allotted to each.

"On the 7th of April, 1896, Joseph V. Snyder, referring to this deed for description, conveyed the real estate embraced therein, in fee to Flora Grandstaff, with general warranty, and upon the expressed consideration of one dollar cash in hand paid, and on the same day, and shortly thereafter, intermarried with her. This deed was duly recorded on the 8th, and within some six weeks thereafterward Joseph V. Snyder died without is-

sue, or possibility of issue. His father is his ⁴⁷⁶ heir, and A. J. Grandstaff is his administrator, and his widow and father are his distributees.

"L. A. Snyder, Amanda Long, and Lee Long, her husband, filed their bill to December rules, 1896, claiming that, under the will of Israel Allen, they are entitled to the real estate by virtue of survivorship; that Mrs. Flora Snyder withholds possession from them; that under a proper construction of the deed of 20th of July, 1895, they never parted with this interest, but if such deed should be otherwise construed, that it was executed under a mutual mistake, and contrary to the real intention of the parties; and they pray that the same may be reformed, and for general relief. To this bill the administrator and widow are made parties. No claim is asserted against or through the estate of Joseph V. Snyder. The widow demurs to the bill, and files her answer. Depositions on the part of the plaintiffs have been taken, with intent to show mistake, and on the part of the defendants to show that the consideration of the deed to her was marriage. In her answer, after denying any mistake in the deed, she claims to be a purchaser for value without notice.

"I do not think the bill is multifarious, for parties have the right to state their case in the alternative. Multifariousness does not arise from the presentation of different views of the same collocation of facts, but it must be two distinct collocations of distinct and different facts, each collocation presenting different rights, and calling for different relief. Equity is the proper forum for the reformation of a deed, and I have reached the conclusion that this claim in the bill of a mutual mistake prevents the bill from being demurrable, even though the bill fails to allege notice to a purchaser for value. There is no doubt that complainants must prove notice to a bona fide purchaser for valuable consideration, but under the decision of the court of appeals in *Rorer Iron Co. v. Trout*, 83 Va. 415, 5 Am. St. Rep. 285, the defense must be made by plea or answer. This case seemingly conflicts with *Carter v. Allen*, 21 Gratt. 241, on this point, but it is ⁴⁷⁷ a later case, and the views of the court are sustained by reference to various authorities, and I have not observed that it has yet been overruled. Besides, in the case at bar, the defense is made by answer, and can better be considered in connection with the evidence than upon demurrer. I therefore overrule the demurrer.

"Passing from the demurrer, the first suggestion is the question we adjourned from the demurrer, namely, assuming that

a mistake has been made, how is the defendant affected thereby?

"1. A purchaser for value and without notice is not affected by any latent equity. A mutual mistake stands on the same footing as any other equity. Kerr on Fraud and Mistake, page 436, specifically lays this down as to mistake. I quote: 'As against a bona fide purchaser for value without notice, no relief can be had in equity.' Almost the same words are used in Pomeroy on Equity, section 776. But the case of *Carter v. Allen*, 21 Gratt. 241, and on this point it is cited with approval in *Rorer Iron Co. v. Trout*, 83 Va. 415, 5 Am. St. Rep. 285, is directly in point. 'The doctrine that the courts of equity will not grant relief against bona fide purchasers without notice has always been adhered to as an indispensable muniment of title. It is wholly immaterial of what nature the equity is, whether it is founded on a lien or encumbrance, or trust, or a fraud, or any other claim; for a bona fide purchaser of the estate for a valuable consideration without notice purges away the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the violation of his trust, and meditated fraud.' In *Rorer Iron Co. v. Trout*, 83 Va. 415, 5 Am. St. Rep. 285, the same broad doctrine is laid down: 'It cannot be questioned at this day that the purchaser for value without notice, actual or constructive, will not be affected by a latent equity, whether by lien, encumbrance, or trust, or fraud, or any other claim.'

"2. A deed made by a man to his intended wife, followed by marriage, is conclusively presumed to be in consideration ⁴⁷⁸ of marriage, and is based on a valuable consideration. In *Sterry v. Arden*, 1 Johns. Ch. 271, Chancellor Kent says: 'The marriage was a valuable consideration, which fixed the interest in the grantee against all the world, and as much as if she had paid an adequate consideration pecuniarily. It has been a principle of long standing, and uniformly recognized, that a deed voluntary or fraudulent in its creation, and voidable by a purchaser, may become good by matter ex post facto. It is the constant language of the books and of the courts, that a voluntary deed is made good by subsequent marriage, and marriage has always been held to be the highest consideration in law.' He cites for this *Coke on Littleton*. This citation is quoted with approval by the court in *Huston v. Cantril*, 11 Leigh, 136, and in *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405. In the last-named case, which is an exceedingly careful discussion of the matter by Judge Staples, Justice Story is quoted with approval

as follows: 'Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but a consideration of highest value, and, from motives of the soundest policy, is upheld with steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration.'

"Judge Tucker, in *Huston v. Cantril*, 11 Leigh, 136, says: 'Marriage, from the earliest times, has been considered in law a valuable consideration.'

"Judge Baldwin, in *Welles v. Cole*, 6 Gratt. 645, says: 'Marriage furnishes a valuable consideration for an agreement, as much so as money paid, or agreed to be paid.'

"I might multiply indefinitely citations to show that a voluntary deed before marriage, upon marriage becomes a deed for valuable consideration, for the citations above made are from cases of this character. Such undoubtedly is the law, unless the code has changed it. Judge Burks, in his review of the changes made by the code, assigns, as a reason for the change made by section 2459, that it was intended to defeat frauds ⁴⁷⁹ perpetrated upon existing creditors by the marriage of an insolvent debtor, accompanied by gifts to his wife. *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405, and *Coutts v. Greenhow*, 2 Munf. 363, 5 Am. Dec. 472, furnish instances of gross injustice to existing creditors. In these cases the man cohabiting with a woman for years in concubinage, becoming involved, conveyed to her all his property, and then married her. Marriage in such extreme instances furnished the valuable consideration, and the settlements were maintained, and just creditors defeated. Actually a man was allowed to do for his concubine what he could not do had she been his lawful wife. In the transformation of the character of the relationship, she carried his property beyond the reach of just obligations. It was to correct any repetitions of such an evil that the change was made. This object is plainly expressed in the wording of the law. The statute does not declare that such conveyances are voluntary. It simply declares that conveyances upon consideration of marriage are void as to existing creditors. Complainants present no claim as creditors; they claim, not as subsequent purchasers, but as paramount purchasers under the will of Israel Allen. The statute does not seem to make reference to this class of rights, and I believe the doctrine applies that the law will not be considered changed by statute beyond the modifications of the statute. It is not necessary to refer to the testimony in relation to the considera-

tion of this deed. The law imports that the consideration was marriage, and the parol testimony is but confirmatory of what the law, unaided by testimony, presumes. I believe the conclusion, then, is inevitable, that Mrs. Snyder is a purchaser for value.

"3. The burden is now on the complainants to show that she is a purchaser with notice. This notice may be actual or constructive. It is not pretended by the complainants that they, or anybody else, told this purchaser for value of the equity, although some of them seem to have known of the deed of April 7th, prior to the marriage ceremony. ⁴⁸⁰ It is urged that the confidential relations between the grantor and grantee in the deed of April 7th, will imply that the grantee received notice. This confidential relation was not held sufficient in *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405, when a great wrong was perpetrated on creditors. The deed itself imports that Joseph Snyder did not know of, or recognize, the equities of complainants. Why should we suppose that he conveyed a title to Flora Grandstaff, telling her that he had no such title to convey? Nor is anything to be inferred from the fact that she was in the habit of passing by the several tracts of land. What more natural than to suppose that she drew the natural inference that the parties were in possession under their deeds? This is all the evidence to show actual notice. As to constructive notice, the principal point urged in argument was the existence of a preliminary contract, of date — April, 1895, which should have apprised Mrs. Snyder that the deed of 20th of July, 1895, was made under mistake. There is no evidence to show that Mrs. Snyder knew of this contract. If, by reading the deed of the 20th of July, 1895, she could gather there was a contract of such date or character in existence, it is more than I have been able to do, after careful study. But suppose that she did know of it, that every provision in it was known to her, this does not prove that she did know the deed did not express the final and true agreement between the parties. On the contrary, she would have a right to presume that the purposes of the parties were altered, if there was conflict between the agreement and deed. In *Donaldson v. Levine*, 93 Va. 472, the court says: "The burden is throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement by the clearest and most satisfactory evidence. It must not only appear that the parties entertained a different intention in the first instance, but that it was not changed at or before the execution of

the instrument; for otherwise the legal and natural inference is, it was laid aside for that expressed in the writing.' Why should anyone ⁴⁸¹ be required to look behind the recorded title, and run down the preliminary contracts to discover that the parties to a solemn deed have made a mistake? In the first recital of the deed, reference is made to the third clause of the will, and the parties declare that under said clause they are entitled to the whole estate. This is a mistaken construction of that clause, but so far from showing that the parties intended to convey only a limited estate, it goes strongly to show that it was their intention to convey the whole estate. Why recite they were entitled to the whole, if they intended to convey only a part, and do not then use restrictive words? It is a principle, too, that purchasers for value have a right to rely on the affirmations of grantors, and grantors are bound by their affirmations of title: See Reynolds v. Cook, 83 Va. 817, 5 Am. St. Rep. 317; Nye v. Lovitt, 92 Va. 710.

"I have come to the conclusion that there was nothing on the face of the deed from which Mrs. Snyder could have inferred that the parties thereto had made a mistake. She stands as a purchaser for value and without notice, and has a right to such title as the deed of the 20th of July, 1895, conveys. This renders wholly unnecessary any consideration of the evidence as to whether a mistake in fact was made, or whether it was such a mistake as equity would correct. It is certain that the parties cannot be restored to the status quo of the 20th of July, 1895. The right of survivorship in the lands of the complainants held by Joseph V. Snyder on that day, and which, it is claimed, he surrendered to them in consideration of their surrender to him, was worth at least as much as the rights they surrendered to him. It is not shown there was anything unreasonable in the exchange. Today, by the providence of God, his right is worth nothing. Theirs, they claim, is worth this \$10,000 farm. Contingencies have become events. A reformation is a revision now. The altered conditions are not favorable for the interposition of equity, to say the least. There seems to have been no haste about the deed. Five persons signed it. Three ⁴⁸² on its date acknowledged it in Shenandoah; two on the 1st of August, in the county of Page, and it was not recorded until 2d of October.

"Having reached the conclusion that each party is entitled to stand upon the deed as written, I am in exceeding doubt if the province of the court of equity is not exhausted. The construc-

tion of the muniments of title, whether the same be deed or will, furnishes no ground of equitable jurisdiction. Courts of law construe deeds or wills involving legal rights. Where there are mutual rights under the same instrument, whether deed or will, in the same property, courts of equity often have jurisdiction to define and partition, or otherwise divide, but where one holds adversely to the instrument, under which another claims, there is no jurisdiction in equity, whether the instrument is a deed or will, as a general rule. Certainly not for the mere purpose of construing the deed or will. If such were the case, all a party would have to do in any case would be to file his muniments of title with his bill, aver some one holds adversely, and pray the court to say if he was not entitled. The action of ejectment would soon become obsolete. In this case I have proceeded on the theory that a purchaser for value without notice is protected against any equity that may exist. This is a matter of defense. Again, in certain contingencies, this widow may be entitled to dower. It has been decided in Virginia that widows are endowable in defeasible fees of this character, even where the husband died without issue: *Jones v. Hughes*, 27 Gratt. 560; *Medley v. Medley*, 27 Gratt. 568. If the deed of the 20th of July should be held not to pass the right of survivorship, and should the deed of the 7th of April, under sections 2270 and 2271, be held no bar to dower, the widow in this case would be entitled to dower. After a good deal of hesitation, I think the court should proceed to a final determination of the rights of parties.

"There are some cases which hold that a partition deed is not to be so strictly construed as other deeds. This was decided ⁴⁸⁸ prior to our code, under the law which then seemed to exist, that partition between coparceners and cotenants might be by parol. No deed being necessary, the title vested, not by operation of the deed of partition, but by virtue of the original grant. The code made a deed necessary, and the reason no longer exists. But, however this deed is viewed, it unmistakably conveys unto Joseph V. Snyder, his heirs, and assigns, all of the right, title, and interest of the parties of the first part. It precedes this sweeping granting clause by a declaration that it is the intention of the parties to vest exclusive title to the tracts of land in the grantee, and throughout the deed it wholly discards any right of survivorship in the grantors. There is no ambiguity about the word 'all'; a conveyance of 'all' is not a reservation of 'part.' Suppose anyone examined this deed for the purpose of lending money on it, would he not have been justified in believ-

ing that the grantors no longer retained any interest in the property? The widow, as we have seen, stands in this position. I am of the opinion that the title of survivorship did pass under this deed to Joseph V. Snyder, and that by his deed to Flora Grandstaff the same became invested in her.

"I think the court should refuse relief to parties careless enough to blunder, who received at the time full value for their blunder, who have everything to gain and nothing to lose by its correction now, as against one who dealt for a valuable consideration on the faith of their recorded deed."

Upon a careful examination of the record, we find that our views of this case are fully and clearly expressed in the opinion of Judge Thomas W. Harrison, which this court adopts; and, for the reasons therein given, we are of opinion that there is no error in the decree complained of, and it is therefore affirmed.

PLEADING—BILL IN EQUITY—MULTIFARIOUSNESS.—No general principle in regard to multifariousness can be extracted from the cases. It must be left to the discretion of the court in each case: *Notes to Hall v. Henderson*, 62 Am. St. Rep. 148; *Fellows v. Fellows*, 15 Am. Dec. 427-430. But a bill in equity may be framed in a double aspect, embracing alternative averments for relief, provided each aspect entitles the complainant to substantially the same relief, and the same defenses are applicable to each: *Hall v. Henderson*, 114 Ala. 601, 62 Am. St. Rep. 141.

EQUITY—JURISDICTION—REFORMATION OF INSTRUMENTS—MISTAKE.—A court of equity will not entertain jurisdiction of purely legal questions, such as the construction of a deed, devise, or will: *Simmons v. Hendricks*, 8 Ired. Eq. 85, 55 Am. Dec. 439; *Bussy v. McKie*, 2 McCord Eq. 23, 16 Am. Dec. 628. It will not interfere where the remedy at law is complete and adequate: *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516; but will in cases where the courts of law cannot grant relief: *Lining v. Geddes*, 1 McCord Eq. 304, 16 Am. Dec. 606. It will not entertain jurisdiction of a cause involving the title to land, where no ground of equity is alleged: *Bussy v. McKie*, 2 McCord Eq. 23, 16 Am. Dec. 628. Mistake in a written instrument is a proper ground for relief in equity, and it may be reformed to express the meaning and intention of the parties: See monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 481, on reformation of contracts.

MARRIAGE IS A VALUABLE CONSIDERATION for a conveyance, or other contract—the highest known to the law: *Nowack v. Berger*, 133 Mo. 24, 54 Am. St. Rep. 663. A contract of marriage is not only a good, but a valuable, consideration for a deed: *Prignon v. Daussat*, 4 Wash. 199, 31 Am. St. Rep. 914. Compare *Lafontaine v. Hayhurst*, 89 Me. 388, 56 Am. St. Rep. 430. A promise of marriage is a valuable consideration for a deed, and, if the marriage afterward takes place, the deed is valid, so far as the consideration is concerned: *Tolman v. Ward*, 86 Me. 303, 41 Am. St. Rep. 556.

EVIDENCE—BURDEN OF PROOF.—One who asserts a fact must ordinarily assume the burden of proving it: *Foster v. Reid*, 78

Iowa, 205, 16 Am. St. Rep. 437, and note. The burden is generally on the party holding the affirmative: *Bowser v. Bliss*, 7 Blackf. 344, 43 Am. Dec. 93.

VENDOR AND PURCHASER—NOTICE.—One who purchases for a valuable consideration is not chargeable with notice, unless the circumstances are strong enough to fix upon him the imputation of mala fides: *Note to Anderson v. Blood*, 57 Am. St. Rep. 521. But, whatever will put a purchaser on inquiry and lead to knowledge is notice: *Note to Pleasants v. Blodgett*, 42 Am. St. Rep. 627.

CONTRACTS—MERGER OF AGREEMENT INTO WRITING.—When parties reduce their contract to writing, all oral negotiations preceding and accompanying the execution of the written contract are deemed merged into it, and the writing is the exclusive evidence between the parties: *Note to Palmer v. Farrell*, 15 Am. St. Rep. 714.

CAMP v. BRUCE.

[96 VIRGINIA, 521.]

CONTRACTS—ILLEGALITY OF, IS FATAL.—The law refuses to enforce illegal contracts from reasons of public policy, and it is immaterial at what stage of the case the illegality appears.

CONTRACTS—ILLEGALITY—WAIVER—FAILURE TO PLEAD.—The illegality of a contract cannot be gotten rid of either by a failure to plead it, or by agreeing to waive it in the most solemn manner.

APPEAL—ILLEGALITY OF CONTRACT MAY BE FIRST RAISED ON.—A suit in equity cannot be maintained upon an illegal contract, although the defense of illegality was not raised by the pleadings, or relied upon in the trial court. It may be made for the first time on the argument in the appellate court.

CONTRACTS OPPOSED TO PUBLIC POLICY—JUDICIAL SALES—BUYING BIDS.—The object in judicial sales is to get the best price that can be fairly had for the property. Hence, to allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price, is condemned by the law, and the courts will not enforce contracts founded in such practices.

CONTRACTS OPPOSED TO PUBLIC POLICY—JUDICIAL SALES—BUYING BID BEFORE CONFIRMATION.—An agreement between the purchaser at a judicial sale and another person that the former will, upon a confirmation of the sale, sell the property to the latter at an advanced price is contrary to public policy and void, because it tends to prevent the property from bringing the best price.

JUDICIAL SALES—SALE OF BID AT AN ADVANCE—CONFIRMATION.—A court will never, where the facts are known to it, confirm a judicial sale, if the bidder has sold his bid at an advance, unless the advance paid, or to be paid, inures to the benefit of the parties to the suit.

JUDICIAL SALES—RIGHT OF COURT TO KNOW ALL THE FACTS—DUTY OF COMMISSIONER.—A commissioner who makes a judicial sale is the agent of the court, and should report

his information of facts, particularly as to the buying of bids before confirmation, to the court, as the court has a right to know all that he knows about the matter, to the end that the sale may not be confirmed unless it is proper to do so.

Suit for specific performance brought by the appellants, W. N. Camp and P. D. Camp, against the appellee, B. M. Bruce. The purpose was to compel Bruce to convey to the complainants a tract of 2,900 acres of land. The complainants charged that Bruce had bought the land at a judicial sale, and before confirmation had sold the land to them at a price stated, which was about \$500 in excess of the amount which Bruce had agreed to pay for it, and had agreed that, upon confirmation, he and his wife would unite with the commissioner and make them a deed; but that, by trickery, scheming, and fraud, the said Bruce fraudulently and deceitfully contrived to defeat his agreement with the complainants by having an upset bid put in for the land, for the benefit and advantage of himself. On June 11, 1894, Bruce purchased the land for \$2,100; and, after sundry upset bids and resales, he finally became the purchaser on July 9, 1895, at the price of \$4,850, which sale was confirmed. He had the property when this suit was commenced. The complainants averred their readiness and willingness to comply with their part of the contract, and prayed that Bruce be compelled to convey the land to them.

Jackson Guy and J. B. Prince, for the appellants.

R. H. Rawles, R. E. Boykin, and Neely, Seldner & Warrington, for the appellee.

523 BUCHANAN, J. The record shows that on the eleventh day of June, 1894, at a judicial sale in the case of Ranstead v. Ranstead, et cetera, the appellee purchased a tract of land containing 2,900 acres at the price of \$2,100; that he complied with the terms of sale by paying the cash required and executing his bonds for the deferred payments, that the sale was reported to the court, but pending confirmation he entered into a written agreement with the appellants by which, in consideration of their assuming payment of the purchase money bonds held by the commissioner, and the payment of \$1,565, to the appellee (which was \$500 profit on his bid), he sold and conveyed all his right, title, and interest in the land, and in the sale and purchase thereof, to the appellants, and agreed that he and his wife would unite with the commissioner in his conveyance of the land which he was directed to ask the court to have made to the appellants. An up-

set bid having been put in, the sale to the appellee was set aside, and a resale ordered. After the land had been resold several times, upset bids having been put in from time to time, the appellee finally became the purchaser at the price of \$4,850, at a sale which was confirmed.

Some months after the confirmation of that sale, the appellants filed this bill to compel the appellee to specifically execute ⁵²⁴ his agreement with them, upon the ground that he, in violation of its provisions and in fraud of their rights, had improperly and fraudulently procured the upset bid to be put in which prevented the confirmation of the first sale made to him.

The appellee answered the bill, and, among other things, admitted the execution of the agreement, and alleged that he would have complied with its provisions if the sale had been confirmed, but denied that he procured the upset bid to be put in which prevented its confirmation.

The first question to be determined is, whether that agreement is one which a court of equity will enforce. If it be an illegal contract, as claimed in argument, this suit cannot be maintained, although that defense was not raised by the pleadings, nor relied upon in the circuit court. The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor from any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it, or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation: Fry on Specific Performance, sec. 309; 1 Story's Equity Pleading, 261; Pomeroy's Specific Performance of Contracts, 2d ed., sec. 286; Coppel v. Hall, 7 Wall. 542.

We have no statute declaring that contracts like the one under consideration are unlawful, yet under the principles of the common law any contract that is made for the purpose of, or whose necessary effect or tendency is to lessen competition and restrain bidding at judicial sales, is held to be illegal because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law, therefore, is to secure such sale from every kind of improper influence. To allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price, is condemned by ⁵²⁵ the law, and

the courts will not enforce contracts founded in such practices: *Underwood v. McVeigh*, 23 Gratt. 409, 428, 429; *Cocks v. Izard*, 7 Wall. 559, 562; *Fry on Specific Performance*, sec. 308; *Pomeroy's Specific Performance of Contracts*, sec. 283; *Greenhood on Public Policy*, 183-189. Tested by these principles the agreement in question was clearly illegal.

If the parties had succeeded in having the sale confirmed by the court and the appellants substituted as purchasers, in lieu of the appellee, at his bid of \$2,100, the agreement would have operated as a fraud upon the court and the parties whose lands were being sold for purposes of partition. It would have enabled the appellee to put \$500 in his pocket for which he furnished no valuable consideration, would have taken from the co-owners that much of their inheritance and enabled the appellants to get the property by buying off the court's bidder instead of putting in an upset bid, and taking the chances of having to pay a higher price for it at a resale. Neither in this case nor in the case in which the land was sold could such an agreement be enforced. If the commissioner who made the sale in the case of *Ranstead v. Ranstead* had reported to the court that, since the sale made by him, the appellee had sold his bid to the appellants at a profit of \$500, to be paid when the sale was confirmed (as he ought to have done, for he wrote the agreement, and knew all the facts, and the court, whose agent he was, had the right to know all that he knew about the appellants' dealings with its bidder that could affect the confirmation of the sale), instead of merely reporting that the appellee desired the conveyance for the land to be made to the appellants, the court would not have confirmed the sale at the appellee's bid of \$2,100, although no upset bid had been put in.

A court will never, where the facts are known to it, confirm a sale where the bidder has sold his bid at an advance, unless the advance paid, or to be paid, inures to the benefit of the ⁵²⁶ parties to the suit. It does not allow bidders to trade behind its back, and speculate in that way on property which it is selling: 2 *Daniell's Chancery Practice*, 2d ed., 1285; *Hodder v. Ruffin*, 1 Tam. 341.

In order to prevent this, it became the practice of the English chancery courts, in the time of Lord Eldon it is said, to require the bidder who desired the court to substitute another in his stead to file an affidavit that there was "no underhand bargain between them": *Rigby v. McNamara*, 6 Ves. 515; *Vale v.*

Davenport, 6 Ves. 615; Holroyd v. Wyatt, 9 Jur. 1072; 2 Coll. C. C. 327.

The rule of the English chancery courts upon this subject is thus stated in 2 Daniel's Chancery Practice, fifth edition, 1285: "If, after becoming the bidder for an estate, the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, the court will, on motion, make an order to that effect; he must, however, support the motion by an affidavit that there is no under-bargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the court; and the rule appears to be that, if a purchaser resell behind the back of the court before the purchase is confirmed, the second purchaser is considered as a substituted purchaser, and must pay the additional price into court for the benefit of the estate. When the highest bidder at an auction induced the auctioneer to accept another person in his place, concealing the fact that he had sold his bargain at an advance, which he received and absconded, the property was ordered to be resold, reserving all questions of liability of the original or sub-purchaser."

The English rule of requiring affidavits, where one purchaser is asked to be substituted for another, is a wise one, and the agreement sought to be enforced shows the necessity for some such safeguard in our practice. It might be well for our courts in all such cases, unless the parties consent to the substitution, to adopt the English practice. It is of the utmost ⁵²⁷ consequence that judicial sales, and especially sales for partition where infants are generally interested, should be protected from practices and influences which may prevent the lands from bringing the best price.

The bill was properly dismissed by the circuit court, and its decree must be affirmed.

CONTRACTS — ILLEGALITY — ENFORCEMENT—JUDICIAL SALES.—Courts will not enforce illegal contracts: *Bradtfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701, and note. Any agreement whereby bidding is checked or stifled at an auction or a judicial sale is void, as against public policy: *Note to Jones v. Caswell*, 2 Am. Dec. 138; *Loyd v. Malone*, 74 Am. Dec. 187. Compare *Barton v. Benson*, 126 Pa. St. 431, 12 Am. St. Rep. 883.

SPILLER v. WELLS.

[96 VIRGINIA, 598.]

JURISDICTION—COURTS OF CONCURRENT—WHICH ACQUIRES PRECEDENCE.—In case of a conflict of jurisdiction between two courts having concurrent jurisdiction, that court which first acquires cognizance of the controversy, or obtains possession of the property in dispute, is entitled to retain it until the end of the litigation, and should decide all questions which legitimately flow out of the controversy.

JURISDICTION—HOW ACQUIRED—CONCURRENT JURISDICTION—PRIORITY—SERVICE OF PROCESS.—Jurisdiction is acquired by the issue and service of process, and, in case of conflict between courts of concurrent jurisdiction, the date of service of the process determines the priority of the jurisdiction; but it is an essential condition in the application of this rule that the first suit shall afford the plaintiff in the second an adequate and complete opportunity for the adjudication of his rights.

MECHANIC'S LIENS—SUIT BY SUBCONTRACTOR TO ENFORCE—PRECEDENCE WHERE DIFFERENT COURTS HAVE CONCURRENT JURISDICTION.—If a subcontractor institutes a suit in chancery to enforce a mechanic's lien, and makes the general contractor a party defendant, setting forth the latter's recorded lien in his bill, that court, notwithstanding the concurrent jurisdiction of another court, acquires jurisdiction, and should determine the rights of the parties. It is not incumbent on the general contractor to institute a separate suit in order to enforce his lien, as his rights, as well as those claiming under him as subcontractors, may be fully protected in the first suit.

LIMITATIONS OF ACTIONS—MECHANICS' LIENS—EFFECT OF SUIT BY SUBCONTRACTOR.—Upon the institution of a suit by a subcontractor to enforce a mechanic's lien, where the general contractor is made a party defendant, and the latter's recorded lien is set forth in the subcontractor's bill, the statute of limitations ceases to run, not only as against the complainant's lien, but as against the lien of the general contractor and of all those claiming as contractors under him.

Appeal from a decree of the law and chancery court of the city of Norfolk in a suit in chancery wherein the appellees, Wells and others, were the complainants, and the appellants, Spiller and others, were the defendants.

George McIntosh, for the appellants.

Thomas W. Shelton and R. H. Baker & Son, for the appellees.

599 KEITH, P. The facts with which we have to deal are as follows: Appellants contracted with Wells to erect a three-story brick building in the city of Norfolk, which was completed on the fourth day of July, 1896. On the thirtieth day of August of that year, Wells perfected his lien as general contractor by filing in the clerk's office of the corporation court of the city

of Norfolk an account showing the amount and character of the work done, the material furnished, the prices charged therefor, the payments made, and balance due, and a description of the property upon which he claimed a lien, all of which was duly recorded by the clerk.

At rules held in the clerk's office of the court of law and chancery of the city of Norfolk on the first Monday in January, 1897, Wells filed his bill to enforce this lien. Appellants were made parties defendant, and into this suit came a number of persons claiming as subcontractors under the plaintiff, and asking to have their rights protected.

William H. Barnard, doing business as Barnard & Co., also filed a petition in which he alleges that J. W. Wells, the general contractor, had contracted with him to do the tinning, iron work, and plastering, and to furnish the necessary terra cotta pipe and work for draining the building to be erected; that petitioner had fully complied with his contract with Wells, and had on the 31st of July, 1896, filed his mechanic's lien upon the building in the clerk's office of the corporation court of the city of Norfolk for eighteen hundred and thirty-six dollars and eighty-eight cents, that being the balance due to him, and on the next day gave notice in writing to the owners of the property of the amount and character of the lien. Petitioner further avers that on the 26th of December, 1896, he instituted a suit in chancery in the circuit court of the city of Norfolk against Wells, the general contractor, and the owners of the building, to enforce his said lien; that ⁶⁰⁰ the circuit court thus acquired jurisdiction of the suit, of the parties thereto, and the subject matter thereof. On the 28th and 29th of December process in said suit was duly executed on all the defendants, and from that time the circuit court had "exclusive jurisdiction of all matters growing out of the enforcement of the mechanic's lien against the property, and the settlement of all matters in controversy concerning said liens."

The prayer of the petition is, that the suit instituted by Wells in the court of law and chancery of the city of Norfolk to the first January rules, 1897 (which was Monday, the third day of the month), may be dismissed, or that he may be restrained from further proceeding therein until the final disposition by the circuit court of the city of Norfolk of the suit instituted by petitioner.

By a decree entered April 10, 1897, the cause was brought on to be heard upon the petition of Barnard & Co. and of the sub-

contractors, and the petition of Barnard & Co. was dismissed, and the cause referred to a commissioner to state certain accounts. The commissioner having reported in obedience to this decree, a further decree was entered on the 1st of July, 1897, ascertaining the amounts due the general contractor and the subcontractors, and directing a sale of the real estate to satisfy their demand. From that decree appellants appealed, and the chief contention is that the court erred in rejecting the prayer of the petition of Barnard & Co.

In *Craig v. Hoge*, 95 Va. 275, this court had occasion to examine the law in relation to a conflict of jurisdiction between two courts having concurrent jurisdiction, and it was there held, Judge Riely delivering the opinion, that "that court which first acquired cognizance of the controversy, or obtains possession of the property in dispute, is entitled to retain it until the end of the litigation, and should decide all questions which legitimately flow out of the controversy; that jurisdiction is acquired by the issue and service of process, and, in ⁶⁰¹ case of conflict between courts of concurrent jurisdiction, the date of service of the process determines the priority of the jurisdiction." It is further stated that technical creditor's bills are exceptions to the general rule which pertains to a conflict of jurisdiction between courts of concurrent jurisdiction; but as the bills before us are not creditor's bills, but suits brought to ascertain and enforce liens binding a specific piece of property, we need not confuse or embarrass the discussion by further reference to this exception. The rule established is necessary to the orderly and decent administration of justice. Nothing can be more unseemly than a struggle for jurisdiction between courts; but a rule which rests for its support upon considerations of convenience, however great, and of decency, order, and priority, however exacting, must yield to the higher principle which accords to every citizen the right to have a hearing before some court. An essential condition, therefore, of the application of the rule insisted upon as to priority of jurisdiction, is that the first suit shall afford the plaintiff in the second an adequate and complete opportunity for the adjudication of his rights. When Barnard & Co. instituted their suit in the circuit court, that court acquired jurisdiction over the subject of litigation, and the parties to it. Wells, who afterward brought suit in the law and chancery court, was made a party defendant. His case is fully stated in the bill; that he was general contractor for the erection of the building, and that he had perfected his me-

chanic's lien, amounting to six thousand, seven hundred and eighty-eight dollars and twenty cents—the precise sum for which the lien is claimed by Wells, in the account filed as an exhibit with his own bill. The lien of Wells, of course, inures to the benefit of all subcontractors, so that they can also be amply protected in the circuit court.

While the suit in that court is not a general creditor's bill, and did not affect the statute of limitations as to creditors not named as parties to it, there can be no doubt that as to liens claimed by parties to it, and directly involved in the suit, the ⁶⁰² statute ceased to run upon its institution. The work was completed on the 4th of July, 1896, and it was necessary to sue within six months, that is to say, on or before January 4, 1897; but we are of opinion that it was not incumbent upon Wells to institute a separate suit in order to enforce his lien, but that he, and those claiming under him as subcontractors, could be fully protected in the suit brought by Barnard & Co., and that the statute ceased to run as to the lien of the general contractor from its institution. If the stoppage of the statute by the suit in the circuit court had not had effect as to the subcontractors, as well as the general contractor, their claims would have been barred when presented in the suit brought by Wells, for their petitions were not filed until the 9th of April, 1897, more than three months after the expiration of the six months within which it was necessary to bring suit.

We are of opinion that the general contractor could have had complete relief in the circuit court which first acquired jurisdiction over the subject of litigation and the parties to it; that from its institution the statute of limitations ceased to run as against his mechanic's lien and all claiming as contractors under him, and that, as a consequence, this case is controlled by the decision in *Craig v. Hoge*, 95 Va. 275; and the decree of the court of law and chancery is therefore reversed.

JURISDICTION—CONCURRENT—WHEN BECOMES EXCLUSIVE.—When the jurisdiction of a court attaches to any subject matter of jurisdiction, although concurrent with other courts, it becomes exclusive for all purposes necessary to the accomplishment of the object of the suit. When courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other: *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 84. As between courts of co-ordinate jurisdiction, the tribunal issuing process has exclusive control over it: *Obapin v. James*, 11 R. I. 86, 23 Am. Rep. 412; and any means of acquiring jurisdiction is properly denominated process: Note to

White v. Johnson, 50 Am. St. Rep. 737. If two or more courts have concurrent jurisdiction over the same subject matter, the court first acquiring jurisdiction by the service of process will retain it, to the exclusion of the other: **Plume etc. Mfg. Co. v. Caldwell**, 136 Ill. 163, 29 Am. St. Rep. 305, and monographic note thereto on conflicts of jurisdiction. See, also, **Gay v. Brierfield etc. Iron Co.**, 94 Ala. 303, 33 Am. St. Rep. 122, and extended note thereto.

MOORE v. TRIPLETT.

[96 VIRGINIA, 603.]

VENDOR AND PURCHASER—ASSUMPTION OF DEBTS—PRIMARY LIABILITY OF PURCHASER.—When a purchaser assumes the payment of certain debts of his vendor, in consideration of a conveyance of land, he is personally answerable therefor, and, as between the vendor and himself, he is primarily liable for such debts.

GIFTS—VALIDITY OF, WHERE OBLIGATIONS EXIST.—A man must be just before he is generous. He cannot, therefore, make a valid gift of his property and leave his obligations unsatisfied or unprovided for.

JUDICIAL SALES — CONFIRMATION—DISCRETION.—A court, in determining whether or not it will confirm a judicial sale, must, under the circumstances of the particular case, exercise a sound legal discretion with a view to fairness, prudence, and a just regard to the rights of all concerned.

JUDICIAL SALES—"UPSET" BIDS—ACCEPTANCE OF.—A court must sell property at the best price obtainable. Hence, a substantial and well secured "upset" bid should be accepted, unless there are circumstances going to show that injustice would be done to the purchaser or other person.

JUDICIAL SALES—"UPSET" BIDS—REJECTION OF—DISCRETION.—If land is sold under the order of a court, and an "upset" bid is made thereon, the court must exercise a sound legal discretion as to whether it will accept it or not. A bid for ten per cent, advance, well secured, and put in before confirmation, is as much a valid bid as if made at the auction, but the court is not always bound to accept it, without regard to the circumstances of the case.

JUDICIAL SALES—"UPSET" BIDS—WHO CANNOT MAKE.—One who was a bidder at a judicial sale, by himself or by an agent, or who was present and had the opportunity to bid, will not, as a general rule, be permitted to put in an "upset" bid. He should have bidden at the sale, in open competition with all others, what he was willing to give for the property.

JUDICIAL SALES—"UPSET" BIDS—WHEN PROPERLY REJECTED—CONFIRMATION.—When a farm, composed of fertile bottom lands and poor uplands, is about to be sold at a judicial sale, and is laid off into parcels, so that one who buys a parcel of the lowland is thereby induced and willing to buy upland which can be used advantageously with it, the court, after the sale, will reject an "upset" bid made at a small advance on only a part of a purchase, where the effect of accepting it would be to cause the

purchaser of two parcels to lose one of them, and without which he would not want the other, particularly if the terms of the "upset" bid preclude a resale of the tract in the manner as before.

JUDICIAL SALES—HOW COURT SHOULD ACT UPON REPORT.—A court should so act upon a report of a sale of property made under its order as not to deter or discourage bidders. It should so act as to induce possible purchasers to attend such sales, to encourage fair, open, and competitive bidding in order that the highest possible price may be obtained, and to inspire confidence in the stability of judicial sales. This is due not merely to the purchaser, but also to creditors, debtors, and the owners of property which has to be sold by the court.

Three chancery suits were heard together, and this was an appeal from several decrees pronounced therein. In 1882, M. M. Moore borrowed \$10,000 of Israel Allen, and secured the same by deeds of trust on portions of his real property. On July 11, 1885, he was largely indebted to his mother, Mrs. A. M. F. Moore, on various accounts, and she was his surety for a large sum. In consideration of these sums, of his mother's assumption of the payment of the debt to Allen, and of certain other enumerated debts, he conveyed to her by deed, dated July 11, 1885, all of his real and personal property, including that covered by the deeds of trust to Allen. Upon the real and personal property so conveyed, outside of that covered by the Allen deeds of trust, the creditors of M. M. Moore had no lien. His wife did not join in this deed. On the same day, July 11, 1885, his mother deeded the property conveyed to her to a trustee to furnish a support for her son, and for the benefit of his wife and children, subject, however, to the payment of the debts for which she was answerable for her son. The two deeds of July 11, 1885, were recorded on the same day, but, a few days afterward, Triplett and others, creditors of M. M. Moore, and whose debts were not secured, attacked the two deeds as fraudulent. Pending this litigation, Allen, who was a party to the suit, directed his trustee to make a sale of the land conveyed in trust to secure his debts. This sale was enjoined. The two causes were finally heard together, and the two deeds of July 11, 1885, were declared to be fraudulent and void, and the property conveyed was held liable for complainant's debts. The defendants asked leave to file a bill of review for errors apparent on the face of the record, but it was denied. On appeal to the supreme court, the decree holding the deeds fraudulent was reversed, and the cause was remanded for further proceedings. It was contended on behalf of Mrs. A. M. F. Moore, and those claiming under her, that her assumption of her son's debts was a mere personal

undertaking on her part, and created no lien on the land conveyed by her, and no trust in favor of the creditors. There was a decree for the sale of the land conveyed by her to pay the debts mentioned, and, when sales of the property were reported to the court, sundry exceptions were filed by the Moores and others. One exception was that substantial "upset" bids had been filed on several of the tracts. In two of the suits, the appellees, Triplett and others, or some of them, were the complainants, and the appellants, Moore and others, were the defendants; and in the other suit the appellants were the complainants, and some of the appellees were the defendants. The main controversy on the appeal is stated in the opinion.

James H. Williams and John E. Roller, for the appellants.

Barton & Boyd, L. Triplett, Jr., and Walton & Walton, for the appellees.

607 RIELY, J. This is the sequel of the case of *Moore v. Triplett*, reported in 23 S. E. 69, decided in 1896.

The main question involved by the appeal is the propriety of the decree of the circuit court subjecting to the payment of the debts of Israel Allen and others the land conveyed by Morgan M. Moore to his mother by the deed of July 11, 1885, and settled by her by a coterminous deed on his wife and children.

The debts were due by him, and assumed by his mother. They constituted a large part of the consideration for the conveyance to her of his land, and were successfully relied upon at the hearing of the former appeal to sustain the validity of the said deeds. She died without having paid the debts, and they have not since been otherwise discharged. They have remained unpaid from 1885 down to the present time, upward of thirteen years. The debts of Allen were secured by prior deeds of trust on parts of the land conveyed by Morgan Moore to his mother.

608 By accepting the conveyance and promising to pay the debts, she became personally liable for them, and, as between her son and herself, she was primarily bound. This doctrine has been so repeatedly recognized by this court as no longer to admit of question: *Willard v. Worsham*, 76 Va. 392; *Osborne v. Cabell*, 77 Va. 462; *Francisco v. Shelton*, 85 Va. 779; *Tatum v. Ballard*, 94 Va. 370; *Ellett v. McGhee*, 94 Va. 377.

The assumpsit by the mother of Morgan Moore of his debts constituting a part of the consideration for the conveyance to

her of his land, it would be against equity and good conscience to permit her to make a voluntary settlement of the property so as to protect it from liability for the debts, so assumed, in the hands of her beneficiaries. A man must be just before he is generous. He cannot make a valid gift of his property and leave his obligations unsatisfied or unprovided for. Indeed, the deed of settlement itself seems to contemplate the payment of the debts assumed from the property conveyed, and makes provision for a sale of a part thereof for that purpose. The grantor was apparently in doubt as to her right to make the settlement, but expresses her desire to do so "as far as legal and proper for her to do." The deed is inartistically drawn, but it is fairly plain that the grantor intended to provide, in the deed of settlement, for the payment, from the property thereby settled, of the debts which she had assumed, in the event that they were not otherwise paid. There is, therefore, no error in the decree for the sale of the land to pay the said debts.

Another assignment of error was the refusal of the court to accept the upset bids put in on certain parcels of the land, and its confirmation of the sale that had been made thereof.

Whether a court should confirm a report of sale depends in a great measure upon the circumstances of the particular case. In acting upon the report, it must exercise not an arbitrary, but a sound legal discretion in view of all the circumstances. It must be exercised in the interest of fairness and prudence, and with a just regard to the rights of all concerned. This is ⁶⁰⁹ the result of many cases on the subject: *Hudgins v. Lanier*, 23 Gratt. 494; *Brock v. Rice*, 27 Gratt. 812; *Roudabush v. Miller*, 32 Gratt. 454; *Berlin v. Melhorn*, 75 Va. 639; and *Hansucker v. Walker*, 76 Va. 753.

In *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 577, it is said: "All the cases agree that the court must sell at the best price obtainable, and when a substantial upset bid, well secured and safe, for ten per cent advance, is put in before confirmation, it is as much a valid bid as if made at the auction. This is the settled law of this court, and will doubtless so remain until the legislature shall [otherwise] provide by law as has been done by the English parliament." This same language was quoted with approval in *Ewald v. Crockett*, 85 Va. 299.

The above statement of law was construed by the counsel of the appellants to be a departure from the previous cases and the former practice in this state, and to mean that "a substantial upset bid, well secured and safe, for ten per cent advance, put

in before confirmation," was always to be accepted, without regard to the circumstances of the case, and that the court had no discretion in the matter. Such a construction is a misapprehension of the import of that decision. The court in that case found no equitable circumstances, which, in the exercise of a sound legal discretion, called for a rejection of the upset bid. It was in amount a large advance on the price obtained at the sale, and in that view substantial. It was well secured and safe. The creditors whom it benefited desired its acceptance, and the purchaser, as the court took pains to show at length, had no just ground of complaint. We understand the decision in that case to mean simply that a substantial and well secured upset bid should be accepted, unless there are circumstances going to show that injustice would be done to the purchaser or other person. That such was the purport of that decision, and the understanding of the judge who delivered the opinion of the court in that case, and also in *Ewald v. Crockett*, 85 Va. 299, is clearly manifested in the subsequent case of ⁶¹⁰ *Carr v. Carr*, 88 Va. 735, where he enunciates the long and well-established rule in Virginia that "the court, in acting upon the matter, was called upon to act in the exercise of a sound legal discretion in view of all the circumstances. It is to be exercised in the interest of fairness, prudence, and with a just regard to the rights of all concerned." And he refers to the cases decided long before *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 577, to sustain his declaration of the practice and the law on the subject in this state.

Considering the circumstances of the case at bar, and applying the rule prevailing in this state, our conclusion is, that the circuit court did not err in rejecting the upset bids and confirming the report of sale of the parcels of land in question.

The sale took place under favorable circumstances, was fairly made, and there is not a suggestion of misconduct or impropriety on the part of anyone.

There is no evidence or complaint even that the land did not sell for a fair price, and bring its market value. The commissioners state in their report that it brought a good price, and recommend the confirmation of the sale.

The main upset bid was put in by one who had an agent at the sale, who bid for him. It has been generally understood by the profession, and enforced by the courts, that one who was a bidder at the sale, by himself or by an agent, which is the same thing, or was present and had the opportunity to bid, would

not, as a general rule, be permitted to put in an upset bid. He must bid at the sale in open competition with all others what he is willing to give for the property. A different rule would have a pernicious effect upon judicial sales of property.

The contention over the rejection of the upset bids is not made by the parties who put in the same, but by the owners of the land. As respects the rights of the latter, it appears that every fair means was resorted to that was likely to realize the best possible price at the sale. It was advertised in two of the county newspapers for upward of sixty days, and the several tracts ⁶¹¹ divided into two or more convenient parcels for the purposes of the sale. The parcels were first offered for sale, and then the tract as a whole, with the understanding that the largest amount realized would be reported to the court as the sale. That by parcels realized the largest amount. The entire farm, embracing all the tracts and parcels, with the exception of the mansion house and fifty-four acres that had been cried out to the wife of Morgan M. Moore, was then offered as a whole, without, however, any advance bid being made on the sale by parcels. The mansion house and fifty-four acres was excepted from the offer of the whole farm at the request of Morgan Moore. As stated by the judge of the circuit court, "the sale of the land seems to have been conducted by the commissioners in strict accordance with the wishes of the Moores, the owners of the land. The terms of the sale were modified to advance their interest. The land was offered in such parcels as they indicated, and offered as long and as often as they requested. They did not then, nor do they now, make any complaint that the sale was not an open and fair bidding, and the prices obtained were not all that could have been expected and desired." The circumstances of the sale furnish them no ground for any complaint.

The case of the purchaser would be very different if the upset bids were accepted. They were made on only a part of his purchases, and his other purchases would stand and be confirmed. The farm is composed of lowlands and uplands. The bottom lands are fertile and productive; the uplands are poor, and in part wild and uncultivated. In dividing the farm for the purposes of sale, it was wisely so laid off into parcels that anyone buying a parcel of the productive bottom land could also buy a contiguous or conveniently located parcel of upland, and the two be utilized together. The owner of the one would find it convenient and desirable to own the other, but he would not desire

to own any part of the upland unless he could also own some convenient part of the bottom land. The purchaser, ⁶¹² J. I. Triplett, having at the sale first bought a parcel of the lowland, was thereby induced and willing to buy upland that could be advantageously used along with it. The latter, without the bottom land, he did not want, and would not have given as much for it as he bid, if, indeed, he had bid for it at all. The upset bids were made on only a part of his purchases, and one of them so circumscribed that, if accepted, he could not bid on the parcels as at the last sale. It was an offer of an advance of seven and a fraction per cent on a parcel of the bottom land bought by him, and upon another parcel of like land bought by another person, and made a condition that both parcels be again offered as one tract. The other upset bid is a small advance on one of the parcels of upland bought by Triplett. If the upset bids were accepted, the effect would be to compel him to take, in any event, all the parcels of upland except one, which he would not have purchased at all if he had not first bought the parcel of bottom land, and force him to buy not only it on the resale, but also the other parcel of bottom land coupled with it as a condition of the upset bid, and incur the risk of having to pay an exorbitant price for them both. This would be eminently unfair and unjust, and a court of equity will never put a judicial purchaser in such a situation. The court, in the interest of fairness and justice, in view of all the circumstances, rightly rejected the upset bids and confirmed the sales of the land as made by the trustee and commissioners under its decree.

Judicial sales are constantly taking place, and it must continue to be so as long as there are debts to be collected, and liens to be enforced. Great care should be observed that the practice of the court in acting upon a report of sale should not be such as to deter or discourage bidders, but such as to induce possible purchasers to attend such sales, to encourage fair, open and competitive bidding in order that the highest possible price be obtained, and to inspire confidence in the stability of judicial sales. This is due not merely to the purchaser, but ⁶¹³ also to creditors, debtors, and the owners of property which has to be sold by the court.

There were a number of other errors assigned which related to minor matters, such as the appointment of the receiver in the case, and the settlement of his accounts. Due notice was given for his appointment and no objection made, and, as re-

spects his accounts, it is sufficient to say, without particularizing, that no error appears in the action of the court.

The decrees appealed from must be affirmed.

JUDICIAL SALES—PROPER CONDUCT OF—DISCRETION OF COURT.—Public judicial sales should be so conducted as to produce as much as possible for the parties in interest, and to that end full, free, and fair competition should be secured: *Note to Herndon v. Gibson*, 37 Am. St. Rep. 767. In judicial sales, the court is the vendor, and it may confirm or refuse to confirm a sale made under its order, in the exercise of a sound judicial discretion: *State Nat. Bank v. Neel*, 53 Ark. 110, 22 Am. St. Rep. 185.

JUDICIAL SALES—ADVANCE OR "UPSET" BIDS.—A RE-SALE of property will not be ordered upon an offer of increase of price alone, when the property has not been sold at a sacrifice. Special circumstances, appealing to equitable considerations, must always exist, where the sale is not void, to justify an order for a resale: *Page v. Kress*, 80 Mich. 85, 20 Am. St. Rep. 504, and note. Compare *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66; *Colonial etc. Mortgage Co. v. Sweet*, 65 Ark. 152, 67 Am. St. Rep. 910, and note thereto showing that the English rule to open a sale whenever an advance of ten per cent on the former sale is offered is not adopted in Alabama.

WRIGHT v. INDEPENDENCE NATIONAL BANK.

[96 VIRGINIA, 728.]

CONTRACTS—DISCHARGE OF FIRST INDORSER BY AGREEMENT FOR INDULGENCE—PARTIES.—An agreement for indulgence which will discharge or release the first indorser on a promissory note cannot be made with any other person than the maker of the note, or principal debtor.

CONTRACTS — EXTENDING TIME TO SECOND INDORSER FOR PAYMENT OF NOTE DOES NOT DISCHARGE FIRST INDORSER OR SURETY.—An agreement between the holder of a negotiable note and a second indorser upon it, to extend the time of payment, does not discharge the first, though an accommodation indorser from his liability on the note, and furnishes no defense to an action brought against him by the holder, as the agreement does not prevent the first indorser from paying the debt, and proceeding at once against the maker, or from exercising any rights which a surety may assert for his protection against his principal.

APPEAL—REVERSAL—ERROR IN GIVING AND REFUSING INSTRUCTIONS.—Conceding that the trial court erred in giving and refusing certain instructions, there should be no reversal where the appellate court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the action of the court in giving the instructions given, or in refusing those which were rejected.

Action on a promissory note, brought by the Independence National Bank against Wright. This was the second action by the

same plaintiff against the same defendant on the same note. The first action had been dismissed, and it was claimed by Wright, the plaintiff in error in this action, that he was released because he had indorsed the note for the accommodation of the maker, and that the first action was dismissed without his knowledge or consent, upon an agreement made with the maker of the note, for a valuable consideration, to forbear to sue for a definite time. The agreement to dismiss was made with one B. E. Hughes, vice-president of the Traders Bank, which bank was the second indorser of the note. Wright claimed that Hughes was acting for the maker of the note, but this was denied. This was the chief controversy in the case, and was decided adversely to Wright, against whom a judgment was rendered, and he sued out a writ of error.

J. E. Edmunds and J. E. Hughes, for the plaintiff in error.

John H. Lewis, for the defendant in error.

720 BUCHANAN, J. The defense relied on in this case is that the defendant, an accommodation indorser, had been released by an agreement of the creditor extending the time for the payment of the writing sued on. That paper was a negotiable note made by W. P. Roberts, payable to H. D. Wright, or order, at the Traders Bank of Lynchburg, indorsed by Wright to that bank, and by it indorsed to and held by the plaintiff as collateral, with other notes, to secure the payment of a note due to it from the Traders Bank. After actions at law had been brought by the plaintiff on the notes held by it as collateral, including the note sued on, the plaintiff made a verbal contract with the Traders Bank by which it was agreed that if the latter would curtail or reduce its note to the plaintiff to one thousand dollars, that it (the plaintiff) would allow the Traders Bank to give a new note for that sum, payable in thirty days, and dismiss all the suits on the collaterals, upon the payment of the court costs and attorney's fees. The curtailment was made, the new note given, the costs and attorney's fees paid, and the suits dismissed.

In the view we take of this case, it is unnecessary to consider whether the agreement made between the plaintiff and **730** the Traders Bank was such an agreement giving time for the payment of the note as would have discharged the defendant if the agreement had been made with the maker of the note, instead of the Traders Bank, the last indorser.

The defendant's counsel insists that, whilst the agreement was made with the vice-president of the Traders Bank, he was the agent of the defendant to have the suit against him dismissed, and that, under the facts of the case, the agreement must be regarded as having been made with the maker of the note as well as with the Traders Bank. In this he is mistaken. The record not only fails to show that the maker was any party to the agreement, but it shows clearly that he was not.

The first question, therefore, to be considered is, whether an agreement for indulgence, which will discharge or release the first indorser, can be made with any other person than the maker of the note, or principal debtor.

In 2 Daniel on Negotiable Instruments, fourth edition, section 1324, it is said: "The agreement for indulgence, in order to discharge the drawer or indorser, must be made with the maker or acceptor who is the principal debtor; and if it be made with a third party, it will not affect the drawer's or indorser's rights or remedies, although such third party may have his appropriate remedy for breach of the contract with him."

The text-writers generally, in discussing the character of the agreement which will operate as a discharge of the indorser, drawer, or surety, seem to treat it as a matter of course that the agreement must be with the principal debtor: 2 Brandt on Suretyship and Guaranty, sec. 342; Baylies on Sureties, 240; 1 Parsons on Bills and Notes, 238; Edwards on Bills and Notes, 567; 24 Am. & Eng. Ency. of Law, 238; 5 Robinson's Practice, 769. And this would seem to be necessarily so from the grounds upon which it is held that the indorser, drawer, or surety is discharged from liability.

The reason given why the extension of time for payment discharges the indorser, drawer, or surety, is because the creditor thereby inflicts an injury on him, and deprives him of the means of relieving himself, either by paying the debt, and immediately proceeding against the principal (being substituted to the creditor's rights), or by filing his bill quia timet to compel the debtor to pay the creditor, for the surety's exoneration; for, if the creditor could not himself, in consequence of his own agreement, compel the principal debtor to pay, neither could the indorser, drawer, or surety who, in such case, asserts the rights of the creditor for his own safety: *Norris v. Crummey*, 2 Rand. 333, 334; *Shannon v. McMullin*, 25 Gratt. 212, 213; 2 Daniel on Negotiable Instruments, sec. 1313.

But if the agreement of the creditor be made with some other person than the principal debtor, what is there to prevent the indorser, drawer, or surety from paying the debt, and proceeding at once against the principal, or from requiring the creditor to forthwith institute suit on the contract as provided by section 2890 of the Code, or from filing his bill quia timet? The principal debtor, being no party to the agreement, and having paid no consideration for the promise, cannot rely on it. This was the view taken by the court in *Frazer v. Jordan*, 8 El. & B. 303, where the agreement was made with a stranger. In that case it was said: "We think that the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor, having given no consideration for the promise, has no ground to complain of a breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him; and we see nothing on which any right, either at law or in equity (see Lord Abinger's observations in *Lyon v. Holt*, 5 Mees. & W. 253, 254), for him to insist upon such contract, can be founded. The stranger may have some private reason of his own to wish for some indulgence to be shown, and, if he has given a good consideration, may be entitled to damages, nominal, large, or small, according to any legal interest he may have, but surely he is the only person to take advantage of his contract."

⁷³² The agreement relied on in this case having been made between the holder of the note (the plaintiff) and the last indorser upon it, did not prevent the first indorser (the defendant) from paying the debt, and proceeding at once against the maker, or from exercising any rights which a surety may assert for his protection against his principal. The agreement did not discharge the first indorser from his liability on the note, and furnished no defense against the plaintiff's recovery.

The action of the court in giving and refusing certain instructions is assigned as error.

It is unnecessary to consider that assignment of error, for if it were conceded that the action of the court was erroneous, as claimed, it is immaterial, for under the facts of the case, upon correct instructions, a different verdict could not have been rightly found by the jury. And it is the settled rule of this court, recognized and acted upon in numerous cases, not to reverse where the court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the action of the court in giving the instructions

given, or in refusing those which were rejected: *Richmond Ry. etc. Co. v. Garthright*, 92 Va. 627, 629, 53 Am. St. Rep. 839; *Brighthope Ry. Co. v. Rogers*, 76 Va. 443, 451.

We are of opinion that the judgment complained of is right, and that it should be affirmed.

A BONA FIDE INDORSER IS DISCHARGED by any dealings between the holder and principal debtor which defeat the indorser's remedy on the instrument, though it is otherwise where no remedy of his is prejudiced: *Pitt v. Congdon*, 2 N. Y. 352, 51 Am. Dec. 299, and note showing what dealings between the principal debtor and the holder will or will not release an accommodation indorser; and that an accommodation indorser is to be regarded as a surety. Compare *Phoenix Brewing Co. v. Rumbarger*, 181 Pa. St. 251, 59 Am. St. Rep. 647.

APPEAL — REVERSAL — HARMLESS ERROR — INSTRUCTIONS.—If the result reached by the trial court is correct, errors in giving or denying declarations of law, or in giving or denying instructions, must be treated as harmless on appeal: *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648. An instruction stating the law too strongly as against the defendant does not entitle him to a reversal, if, under no proper instruction, judgment could have been given in his favor: *Lake v. Hancock*, 33 Fla. 53, 56 Am. St. Rep. 159.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

PARSONS v. PARSONS.

[101 WISCONSIN, 76.]

JUDGMENTS — JUDICIAL DETERMINATIONS—COLLATERAL ATTACK.—A judicial determination may be contrary to conclusive evidence, or legal evidence, or without any evidence, yet not collaterally impeachable for want of jurisdiction.

ADOPTION—CONSENT OF ABANDONING PARENT.—Statute may authorize the adoption of a child without the consent of an absent or abandoning parent, and adoption proceedings had thereunder, and completed without notice to, or consent of, such a parent, are valid.

ADOPTION — STATUTORY CONSTRUCTION. — Adoption statutes are humane provisions which look primarily to the interests of children, and every reasonable intendment should be indulged in, in case of doubt, in the line of promoting that object.

ADOPTION—NOTICE TO ABANDONING PARENT.—Under a statute authorizing the adoption of a child without notice to an abandoning parent, notice to such parent is not requisite to a valid determination of the fact of abandonment as regards all other parties to the proceedings.

ADOPTION — PROCEEDINGS IN — COLLATERAL ATTACK.—Where a proper petition has been filed in adoption proceedings, the court acquires jurisdiction to determine whether the person who signs as next of kin is such, and its determination, whether based upon sufficient evidence or not, cannot be collaterally attacked for want of jurisdiction.

ADOPTION—JUDGMENT OF—ESTOPPEL TO ATTACK.—After the lapse of many years, during which time the status of the subject of adoption has been recognized as legally fixed by the judgment, by all parties to the proceedings, one of those parties, on whose motion the judgment was rendered, is in no position to appeal to equity to declare it void.

Edward S. Bragg, for the appellant.

Gary & Forward and C. A. Forward, for the respondent.

⁷⁸ MARSHALL, J. This case turns on whether the county court obtained jurisdiction to make the order of adoption. It is challenged solely upon the ground that the consent of the living parent, the father, was not given, and there was no adjudication, on notice to the absent parent, of the fact of abandonment, nor any consent given in place of that ⁷⁹ the alleged abandoning parent by the next of kin, nor by a guardian or a suitable person appointed by the court. There is no claim but that the petition, in form, complies with the statute. It alleges every fact which the statute requires, was made by the proper persons, and was verified by them. True, it does not appear that notice was given to the father, and, if that were requisite to the jurisdiction of the court to take any steps in the proceedings, the order of adoption was void. On this subject we are furnished with a learned discussion of the statute and a citation of many authorities on both sides of the controversy, in some of which the subject is considered at great length, but if the statute itself furnishes a plain solution of the question we have no need to go elsewhere to support it.

The statute to be considered is section 4022 of the Revised Statutes of 1878, which reads as follows: "No such adoption shall be made without the written consent of the living parents of such child, unless the court shall find that one of the parents has abandoned the child, or gone to parts unknown." Thus it will be seen that, upon the fact being established that the living parent has abandoned his child, he is deemed by the statute to have thereby relinquished all parental right to be consulted in respect to the child's welfare, and his consent to the adoption is therefore dispensed with. The term "abandon" obviously means no more than neglect or refusal to perform the natural and legal obligations of care and support which parents owe to their children. The fact of abandonment, judicially determined, was essential to the jurisdiction; not essential that it should be determined on proper evidence, necessarily, or in accordance with the truth, because mere error in that regard does not affect jurisdiction. If jurisdiction be obtained to determine a fact, its determination wrong or on insufficient or improper evidence is immaterial on the question of legal right to proceed judicially to the next step. That is deemed to be elementary. Now, that ⁸⁰ the fact of abandonment was judicially determined in this proceeding must be conceded. True, there was

no evidence, so far as appears, but the verified petition, and the allegation of abandonment was on information and belief. That was mere hearsay, but that fact goes merely to the sufficiency of proof, which, as stated, may involve error, but not jurisdictional error. A judicial determination may be contrary to conclusive evidence or legal evidence, or without any evidence, yet cannot be impeached for want of jurisdiction: *Van Fleet on Collateral Attack*, sec. 693, 695. That rule applies to all judicial proceedings. It has often been invoked in proceedings like this. As for example in *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, it was held that if the court has jurisdiction to act at all, however erroneous its action, it must still stand until reversed on appeal.

It follows that the only remaining question on this branch of the case is, Did the court have jurisdiction to act on the subject of the alleged abandonment, in the absence of notice, actual or constructive, to the parent? That must be answered in the affirmative. When the proceedings in question were had, the statute did not require notice, actual or constructive, to a parent who had abandoned his child. That was unquestionably the legislative idea. Resort to rules of liberal construction is not necessary to reach that conclusion. But if the statute would admit of two constructions, the result would be the same. We would feel bound to repudiate the doctrine of strict construction contended for vigorously by appellant. The adoption statute is a humane provision which looks to the interests of children primarily. That is its controlling idea and policy. Therefore, every reasonable intendment should be indulged in, in case of doubt, in the line of promoting that object. Other courts have taken the same view, but, if it were otherwise, our duty to carry out an obvious legislative intent would be the same. That the statute was designed to enable ⁸¹ those who are not blessed with the love and society of children in the family to acquire it by taking them into the family fold and giving a home to those in need of such shelter, protection, and care, thus creating mutual obligations, promotive of mutual happiness and the moral well-being of society, is most clear. It has made, and is making, a multitude of happy homes, happy parents, happy children, and valuable members of society, and no narrow construction should be indulged in that will tend to defeat a result so obviously intended and in every way so beneficial.

The conclusion reached as to the necessity of notice to the absent and abandoning parent is but affirming what was clearly held, inferentially, in *Schiltz v. Roenitz*, 86 Wis. 31; 39 Am. St. Rep. 873. The court there, while holding that the order was not conclusive upon the father on the fact of abandonment, who had no notice of the proceedings, said that it might, however, well be held valid as to the child, obviously meaning because the court had jurisdiction that far, which, of course, included jurisdiction of the petitioner who commenced the proceedings. That such was the intention of the court, as understood by the legislative department of the government, is evidenced by the fact that subsequently a proviso was added to the section in the following words: "Provided, that unless the living parent or parents of a minor consent to such adoption, it shall be the duty of the court having jurisdiction of the proceedings, upon the filing of any petition for adoption, by order to appoint a time and place for hearing such petition and cause notice of such time and place to be given to such parent or parents by personal service of said notice on such parent or parents at least ten days before the hearing or by publication thereof in a newspaper at least three weeks successively prior to said hearing, and, when notice is duly given as herein provided, the parent of any minor shall be bound by the order of adoption as fully as though he had consented thereto": Laws of 1895, c. 18. ⁸² That notice to the parent is not requisite to a valid determination of the fact of abandonment as regards all other parties to the proceedings has been held in numerous cases elsewhere, some of which are cited in the briefs of counsel: *Nugent v. Powell*, 4 Wyo. 173; 62 Am. St. Rep. 17; *Van Fleet on Collateral Attack*, sec. 408; *Barnard v. Barnard*, 119 Ill. 92.

It is further contended by appellant that the county court did not have jurisdiction, because consent to the adoption was not given by the next of kin. Whether the person who signed as next of kin was such in fact was one of the questions which the court had jurisdiction to determine. It was not requisite to jurisdiction that it should be determined rightly. The trite saying applies, that every court has jurisdiction to err in any case, but mere error in determining something the court has a right to determine is irremediable by challenge to the jurisdiction of the court. That the county judge had jurisdiction to determine that W. S. Russell was next of kin to the adopted child

cannot reasonably be questioned. That the fact was judicially determined appears upon the face of the order. True, it was determined by the verified petition only, so far as appears by anything in the proceedings, but, as stated before, that was not material to the jurisdiction. If determined without any evidence whatever, the result would be the same. No doubt it was competent for the county judge to have required other evidence than the petition, but he was not bound to do so. If satisfied of the fact by the petition itself, whether satisfied rightly or wrongly, it was sufficient for the validity of the proceedings. The rule on that subject was definitely stated by Mr. Justice Winslow in *Cody v. Cody*, 98 Wis. 445, to the effect that three things only are necessary to give jurisdiction in an action or proceeding: 1. A tribunal legally organized; 2. Jurisdiction of the subject matter; 3. Jurisdiction of the person; and these things all being present, jurisdiction continues, however erroneous the proceedings ⁸³ leading up to the result finally obtained, unless one of the elements be in the meantime lost.

So a conclusion is reached on the merits of the case that the decision of the circuit court was right and must be affirmed. But if we were to go further, the result would not be otherwise. The proceedings to avoid the judgment of adoption are clearly of an equitable nature, and after the lapse of many years, during which time the status of the subject of adoption has been recognized as legally fixed by the judgment of the county court, by all parties to the proceedings, one of those parties on whose motion the judgment was rendered is in no position to appeal to the equity powers of the court to declare it void. The plainest principles of estoppel apply to the situation. Appellant petitioned for the judgment. It was entered on her motion. The person most interested, the child, was a ward of the court, and its status for life was entirely and irrevocably changed by the result of the proceedings if they were valid. Their validity was recognized by the appellant till she became pecuniarily interested in changing her position. Clearly, she cannot be aided by a court of equity to do that to the injury of the person she was instrumental in locating in her family as her adopted son.

By the Court. The judgment of the circuit court is affirmed.

JUDGMENTS—COLLATERAL ATTACK—WANT OF EVIDENCE.—Judgments are presumed to be founded on proper and sufficient evidence and they cannot be collaterally impeached, no matter how insufficient the evidence may, in fact, have been: Can-

non v. Cooper, 39 Miss. 784, 80 Am. Dec. 101, and note. A judgment cannot be impeached collaterally where it is founded on false testimony: Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; nor where it is founded on incompetent evidence: Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627; nor where the judgment is erroneous: Edmundson v. Independent School Dist., 98 Iowa, 639, 60 Am. St. Rep. 224.

ADOPTION—CONSENT OF ABANDONING PARENT.—The consent of the parents of a child is not necessary to its valid adoption by another, where the statute upon the subject is silent respecting the assent of the natural parents: Clarkson v. Hatton, 143 Mo. 47, 65 Am. St. Rep. 635, and note; Van Matre v. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196, and monographic note thereto.

ADOPTION—NOTICE TO PARENT.—Adoption proceedings instituted upon the application of the mother, without notice to the absent father, in which it is found that such father has abandoned the child adopted, are not subject to collateral attack by the collateral heirs of the party adopting such child, on the ground of the absence of notice to such father: Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, and note.

ADOPTION—STATUTORY CONSTRUCTION.—Statutes authorizing the adoption of the children of other persons should be given a liberal intendment and operation: Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. Rep. 54, and note.

HOLLMAN v. PLATTEVILLE.

[101 WISCONSIN, 94.]

CEMETERIES—BURIAL RIGHTS—LICENSE TO USE GROUND.—One who enters into possession of a lot in a public cemetery, improves the same, and uses it for burial purposes, with the express or implied consent of those who have control of the cemetery, although he acquires no title to the lot, acquires a license to use the same for burial purposes, which license, so long as it continues, will support an action of trespass for any invasion or disturbance of it, whether by the grantors or strangers.

CEMETERIES—REGULATION BY CITY—LIABILITY OF CITY IN DAMAGES.—A city given power, by statute, to adopt regulations as to a public cemetery, and, upon proper notice, to compel lotowners or occupants to comply with such regulations, is liable in damages to a lot occupant, if, without having adopted any regulations, and without notice to him, it invades his lot and cuts down trees which he has planted therein in the improvement thereof.

MUNICIPAL CORPORATIONS—PUBLIC AND CORPORATE DUTIES—LIABILITY ARISING FROM PERFORMANCE.—While a municipal corporation sustains no liability to one suffering injury from the negligent or imperfect exercise of its legislative or governmental powers, the contrary is true as respects the performance and execution of mere corporate duties. As respects such matters, the rule of respondeat superior applies, and the city will become liable for the act of its servants and agents which it has authorized or adopted.

Action for damages arising from the act of the defendant city in removing trees planted by plaintiff in his burial lot in a cemetery under the control of the defendant. Plaintiff had no rights in the lot other than those arising from his occupancy thereof from 1867 to 1894, the year in which the injury complained of was committed, and his improvement of the lot by fencing it and planting the trees in question. Appeal from judgment for plaintiff.

E. E. Burns, city attorney, and J. W. Murphy, for the appellant.

T. L. Cleary, for the respondent.

⁹⁶ BARDEEN, J. This case must be considered and determined upon the certificate of the circuit judge. The recovery was less than one hundred dollars, and the case could only be brought here for ⁹⁷ review upon a certificate of the trial judge, pursuant to section 3047 of the Statutes of 1898. The alleged bill of exceptions sent up with the record cannot be considered, and should have been stricken therefrom. As it appears to us from the statement of facts, the only question we need determine is whether the defendants are liable in damages for the cutting of the trees on the cemetery lot in question. As we view the case, it becomes unnecessary to determine whether plaintiff has the legal title to the lot or not. He entered into possession of the same in 1867, inclosed it by a fence, and planted the trees that were cut down, and, after the fence was removed, has cared for and attended to the lot, "and has been in possession of the same, claiming it as a family burial lot," ever since. Whether his right thereto be considered a mere privilege, right, or easement for the burial of his dead, or whether his rights have ripened into absolute title by adverse possession, it matters not for the purpose of this case. Some courts go so far as to hold that such an easement, as well as title to the soil, may be acquired and perfected by prescription, the right to which cannot be defeated by the owner of the soil: *Hook v. Joyce*, 94 Ky. 450. Others say that where the interment is in a public cemetery, when the parties whose duty is to give burial are not the owners of the soil, they would have no higher right than a mere easement or license: 3 Am. & Eng. Ency. of Law, 50, and cases cited. In any event, so long as the license continued, the lot-holder could maintain trespass for any invasion or disturbance of it, whether by the grantors or strangers: *Partridge v. First*

Independent Church, 39 Md. 631. A case which reviews the authorities at length, and contains an ample discussion of the rights of lot claimants in cemeteries, is *Bessemer etc. Co. v. Jenkins*, 111 Ala. 135; 56 Am. St. Rep. 26. It is there said: "It would seem, therefore, to accord with right principle and authority, that where one is permitted to bury his dead in a public cemetery by the express or implied consent of those in proper control of it, ⁹⁸ he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to action against the owners of the fee or strangers, who, without his consent, negligently or wantonly disturb it." The plaintiff, having a right to and the possession of the lot in question, could certainly maintain an action against any person who unlawfully disturbed or interfered therewith.

But it is said that the statute (Rev. Stats. 1878, sec. 1439) gives the right to the common council to regulate the cemetery as trustees, and that their action in that regard was quasi judicial, and ought not to be interfered with. A perfect answer to this contention is found in section 1453, which grants the power to require any "lotowner or occupant to remove, rearrange, rebuild, or repair any such trees or shrubs planted, fences, structures, headstones, or monuments, so as to comply with such regulations as they shall prescribe, by giving reasonable personal notice in writing so to do"; and, if they fail to do so, they may cause it to be done, and recover the expense thereof from the person liable to such duty. This presupposes the adoption of proper regulations for the management and control of the cemetery, which seems not to have been done in this case. Neither was there any pretense that any notice was given plaintiff to rearrange or remove the trees in question. The acts of the city were wholly without the lines of the statute and without legal justification.

It is further urged that the city was engaged in an act for the public benefit, in which it had no particular interest, and from which it derived no special advantage in its corporate capacity, and therefore it cannot be held liable. The defendant city is a municipal corporation, charged with certain public duties in relation to the state and the public generally, as well as with obligations that are local and relate to the welfare of its members, and the regulation of its internal affairs. In the administration and execution of its legislative ⁹⁹ and governmental powers—such powers as are, in their very nature, public and in aid of the

state—it sustains no liability to one suffering injury, if such powers are imperfectly or negligently executed: Dillon on Municipal Corporations, secs. 965, 966. But, as respects the performance and execution of mere corporate duties, the rule is different. When the act done is within its charter powers and relates to the administration of local or internal affairs, as distinguished from its legislative, discretionary, or quasi judicial duties, the rule of respondeat superior applies, and the city will become liable for the act of its servants and agents, which it has authorized or adopted: Dillon on Municipal Corporations, sec. 980. In this case there can be no question but that the defendant Stephens was the servant of the city and was acting under its authority. The answer expressly admits that the acts done by him were done under the direction and authority of the common council. The city had a right to adopt reasonable regulations for the management and control of the cemetery. It also had the power to enforce its regulations in conformity to the law granting such power. It had no right or authority to disturb or invade the possession of the lot held by plaintiff except in pursuance of its statutory authority. Its fault lay in the attempted exercise of its statutory powers in an unlawful manner, and, having authorized the act done and having adopted the wrongful act of its servant, as appears by its answer, the city must be held to respond for the actual damage done: Dillon on Municipal Corporations, sec. 972; *Wilde v. New Orleans*, 12 La. Ann. 15. See *Wilson v. Mineral Point*, 39 Wis. 160; *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; *Squiers v. Neenah*, 24 Wis. 588; *Crossett v. Janesville*, 28 Wis. 420.

By the Court. The judgment of the circuit court is affirmed.

CEMETERIES — BURIAL RIGHTS — LICENSE TO USE GROUND.—If one has been permitted to bury his dead in a public cemetery, by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to maintain an action of *quare clausum fregit* against the owners of the fee or strangers, who, without his consent, negligently or wantonly disturb it: *Bessemer etc. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, and note thereto; *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 699. After one has purchased a lot in a cemetery, the managers thereof have no right to abridge his right of sepulture by any unreasonable limitations thereon: *Mount Moriah Cem. Assn. v. Commonwealth*, 81 Pa. St. 235, 22 Am. Rep. 743.

CEMETERIES—REGULATIONS BY CITY.—The privilege of burial in a public cemetery is a mere license, subject to municipal regulation, and revocable according to public necessity: Page v.

Symonds, 63 N. H. 17, 56 Am. Rep. 481; Austin v. Austin City Cem. Assn., 87 Tex. 330, 47 Am. St. Rep. 114.

MUNICIPAL CORPORATIONS—DUTIES—LIABILITIES.—A municipal corporation is not liable for injuries caused by the negligence of its agents and officers in the discharge of duties purely governmental or discretionary. But it is liable for injuries caused by its negligence in the discharge of ministerial or specified duties assumed by its charter: Gibson v. Huntington, 38 W. Va. 177, 45 Am. St. Rep. 853, and note. See the monographic note to Goddard v. Inhabitants of Harpswell, 30 Am. St. Rep. 376-413.

HOFF v. OLSON.

[101 WISCONSIN, 118.]

EQUITY—ADEQUATE LEGAL REMEDY—PLEADING.—The objection that the plaintiff in a suit in equity has an adequate legal remedy must be made by demurrer or answer, and, if not so made, is deemed waived, and cannot be raised by demurrer ore tenus.

EQUITY—JURISDICTION—ADEQUATE LEGAL REMEDY.—The ground upon which equity refuses to take cognizance of a case in which an adequate legal remedy exists is not jurisdictional, but merely a rule of practice, upon which the action will be dismissed if the attention of the court is called to it at the proper time and in the proper manner.

EQUITY—SUFFICIENCY OF COMPLAINT—THREATENED INJURY.—A complaint in equity sufficiently shows a threatened unlawful invasion of plaintiff's property rights when it alleges that defendant threatens to tear down a partition fence separating his and plaintiff's property; that such act would result in irreparable injury to plaintiff, and that defendant is insolvent. The objection that plaintiff has an adequate remedy being waived, such complaint is sufficient to maintain an action to restrain the threatened removal of the fence.

APPEAL—OBJECTION TO BILL OF EXCEPTIONS.—The objection that a bill of exceptions was not properly settled, not having been raised in the appellate court before the hearing on the merits, cannot be raised later.

Suit in equity to restrain defendant from removing a partition fence dividing plaintiff's and defendant's property. The complaint alleged the ownership by plaintiff and defendant of adjoining premises, the character of the fence as a partition fence and its maintenance for over twenty years, the irreparable character of the threatened injury, and the insolvency of defendant. Defendant answered denying the allegations of the complaint, and upon the issues so made the case came to trial. Defendant's objection to the introduction of evidence because the complaint failed to show an equitable cause of action was sus-

tained, and plaintiff was denied leave to amend. Appeal from judgment for defendant.

Higbee & Bunge, for the appellant.

Smith & Griffin, for the respondent.

119 BARDEEN, J. The reason usually assigned why a court of equity will not entertain actions of this kind is that the party seeking to prevent the threatened injury has an adequate remedy at law. Beach on Injunctions, section 1125, says: "The inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of chancery in such matters, for the obvious reason that a legal remedy ¹²⁰ has been devised to redress such wrongs, and, so long as the law provides an adequate remedy, equity has no right to interfere." It is well settled in this state, however, that equity will interfere in such cases, and grant the desired relief, unless the plaintiff's right thereto is contested in accordance with the rules of practice in such cases. If it appears on the face of the complaint that the plaintiff has an adequate remedy at law, a demurrer may be interposed. If that fact is not apparent on the face of the pleading, or the defendant is in doubt as to its sufficiency in that respect, advantage of the insufficiency may be taken by answer. If not so taken by demurrer or answer, it is waived. The defect cannot be raised by demurrer *ore tenus* at the trial. This court has not, however, been perfectly consistent in its rulings in that regard. In *Tenney v. State Bank*, 20 Wis. 152, Chief Justice Dixon inaccurately spoke of the objection as one relating to the jurisdiction of the court, and says: "We hold that it is now too late to object to the jurisdiction of the court. The defendant, by answering and proceeding to trial upon the merits, waived it. It is well settled that the objection that the plaintiff has an adequate remedy at law must be taken in the first instance by answer." In *Peck v. School Dist. No. 4*, 21 Wis. 516, he corrected himself. He says: "The ground on which equity refuses to take cognizance of and proceed in such cases, namely, that the plaintiff has an adequate remedy at law, is in no proper sense jurisdictional. The court has power to hear and determine the action, and in general will do so, unless objection in proper form be taken. This may be by demurrer to the complaint, when the objection appears upon the face of it; otherwise by answer. If not taken in one or the other of these forms, it is waived. . . . This

shows that it is not a question of the jurisdiction of the court over the subject matter of the action; for, where that is wanting, it is well known that no consent or waiver of objection by the parties will confer ¹²¹ it. Such an objection is never waived, but may be taken at any time, either on appeal or when the question of jurisdiction is collaterally involved. The objection that the plaintiff has an adequate remedy at law is no more than a rule of practice in the court of chancery, upon which the action will be dismissed if the attention of the court is called to it at the proper time and in the proper manner; and, although it is most frequently spoken of by courts and writers as a question of jurisdiction, it is strictly inaccurate to call it so." This language is quoted with approval in *State v. Circuit Court*, 98 Wis. 143, where many decisions are cited as sustaining the rule thus laid down.

On the point of whether the objection might be raised by demurrer ore tenus taken at the trial, the decisions in this court are somewhat in confusion, although the later rulings are uniformly against it. In *Stein v. Benedict*, 83 Wis. 603, it was said that, "upon a demurrer ore tenus to a complaint which is clearly intended as a complaint in equity, the defendant may avail himself of the objection that the plaintiff has an adequate remedy at law": Citing *Kilbourn Lodge v. Kilbourn*, 74 Wis. 452; *Avery v. Ryan*, 74 Wis. 591; *Denner v. Chicago etc. Ry. Co.*, 57 Wis. 218. These cases hardly sustain the proposition, inasmuch as the decision in each was based on a general demurrer to the complaint. The cases of *Becker v. Trickle*, 80 Wis. 484, *Sherry v. Smith*, 72 Wis. 339, *Pierstoff v. Jorges*, 86 Wis. 128, 39 Am. St. Rep. 881, *Sweetser v. Silber*, 87 Wis. 102, *Meyer v. Garthwaite*, 92 Wis. 571, and *Bigelow v. Washburn*, 98 Wis. 553, are squarely to the point that the objection must be taken by answer or demurrer, or it is waived. *Stein v. Benedict*, 83 Wis. 603, so far as it holds the contrary doctrine, must be deemed to be overruled. In this connection it may be well to notice *Smith v. Oconomowoc*, 49 Wis. 694, which was an action to restrain the defendant from removing a fence and storm door in front of plaintiff's building. This case was tried on its merits, and on appeal ¹²² the judgment in favor of plaintiff was reversed, on the ground that a court of equity would not entertain a suit to prevent a threatened trespass, without first having the legal right determined in an action at law. The court evidently overlooked or ignored the rule of waiver of this objection, as hereinbefore

stated. The court has ample power and will exercise it in such cases, unless due and timely objection is taken either by answer or demurrer. Proceeding to trial without having made the objection in proper form is a full and complete waiver thereof.

The complaint in suit states sufficient to show that the defendant threatens an unlawful invasion of the plaintiff's property rights. The fence in question is alleged to be on the line between the parties, and is a regular partition fence. In the absence of allegation as to a legal division of a line fence, the presumption as to ownership is that it is the common property of the adjoining owners. The fact that the fence is a line fence makes it unlawful for either of the adjoining owners, as against the other, to remove or tear it down without giving notice as required by section 1400 of the Revised Statutes of 1878: *Sayles v. Bemis*, 57 Wis. 315. It is possible that the complaint would have been open to the objection that the plaintiff had an adequate legal remedy, had the objection been taken by demurrer or answer. Failing to do so, it was waived, and the court should have proceeded to try and determine the case.

The respondent made the point that the objection to the complaint was sustained on the ground that it did not state facts sufficient to constitute a cause of action. In answer, we say that we must be governed by the bill of exceptions. The bill, after reciting that an objection had been interposed, says: "But the said judge decided that the objection was well taken, and that no evidence would be received to prove the issues; and no evidence was received, under the rulings of the court, on the ground that said complaint does not state ¹²³ facts sufficient to constitute a cause of action entitling the plaintiff to equitable relief, but that it states a case for which the plaintiff has an adequate remedy at law." This would seem to be a sufficient answer to this contention. The facts stated, together with the alleged insolvency of the defendant, are held to be sufficient to permit the plaintiff to maintain this action, in view of the waiver as before stated.

The bill of exceptions bears the certificate of the circuit judge. If the bill was not properly settled, then it was defendant's duty to have moved to strike it out, or brought the fact to the attention of this court in some proper way, before the hearing on the merits. He cannot be permitted to take advantage of any such technical error after he has permitted the case to be called for final determination.

By the Court. The judgment of the circuit court is reversed, and the case is remanded for further proceedings according to law.

EQUITY—REMEDY AT LAW—DEMURRER ORE TENUS.—When the subject matter of an action is of equitable cognizance, a demurrer ore tenus does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity: *Pierstoff v. Jorge*, 86 Wis. 128, 39 Am. St. Rep. 881, and note.

EQUITY—ADEQUATE LEGAL REMEDY—PLEADING.—If one sued in equity wishes to avail himself of a defense that an adequate remedy exists at law, he must plead it: *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712. And a court of chancery will not refuse to take jurisdiction of a case merely on the ground that the complainant has a perfect remedy at law, if the parties have submitted themselves to the jurisdiction of the chancellor without objection: *Bank of Utica v. Utica*, 4 Paige, 399, 27 Am. Dec. 72; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 525, 49 Am. Dec. 189.

EQUITY—PLEADING—COMPLAINT.—A complainant must state in his bill every fact showing him to be entitled to the relief prayed for: *Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781.

TIDIOUTE SAVINGS BANK v. LIBBEY.

[101 WISCONSIN, 193.]

GUARANTY—ASSIGNABILITY.—A guaranty is assignable with the obligations secured thereby, and goes with the principal obligation. It is enforceable by the same persons who can enforce the principal obligation.

GUARANTY — SPECIAL AND GENERAL DISTINGUISHED.—A general guaranty is one for acceptance by the public generally. A special guaranty is limited to the person to whom it is addressed, and usually contemplates a trust or reposes a confidence in some person. Such a guaranty may not be assignable until the right of action has arisen thereon.

GUARANTY—ASSIGNMENT OF PRINCIPAL OBLIGATION.—The transfer of a note secured by a general continuing guaranty carries with it the security which may be enforced by the transferee, though he took the note without knowledge of the security.

The text of the guaranty sued upon was as follows: "For and in consideration of the sum of one dollar to each of us in hand paid, and in consideration of the granting of credit and discount by W. T. Rickards & Co., of Chicago, Illinois, to the Farson & Libbey Company, a corporation of Chicago, Illinois, we, for ourselves, and for our heirs, executors, administrators, and assigns, do hereby jointly and severally guarantee to said W. T. Rick-

ards & Co., their heirs, executors, administrators, and assigns, the payment of any and all indebtedness now due, or hereafter to become due, to said W. T. Rickards & Co., their heirs, executors, administrators, or assigns, growing out of or occasioned by any, or through any, act or acts of the said Farson & Libbey Company. It is further agreed that such guaranty shall remain in full force and effect in respect to all indebtedness or renewals thereof now existing or hereafter to accrue, growing out of any and all transactions originating prior to the time a notice in writing of the cancellation of this guaranty, signed by either of the undersigned, shall be received by said W. T. Rickards & Co. It is provided, however, that the undersigned shall not be liable under this guaranty for an amount to exceed the sum of twenty thousand dollars (\$20,000). The undersigned hereby waive notice of the acceptance of the guaranty, and of the amount of the indebtedness existing from time to time from said Farson & Libbey Company to said W. T. Rickards & Co." Appeal from judgment for plaintiffs.

Barbers & Beglinger, for the appellants.

Thompson, Harshaw & Thompson, for the respondents.

196 BARDEEN, J. A guaranty is defined to be "a separate, independent contract, by which the guarantor undertakes, for a valuable consideration, to be answerable for the payment of some particular debt, or future debts, or the performance of some duty, in case of the failure of another person primarily liable to pay or perform"; and it is said that such guaranty is assignable, with the obligation secured thereby, and that it goes with the principal obligation, and is enforceable by the same persons who can enforce that: *Colebrooke on Collateral Securities*, sec. 253; *Ellsworth v. Harmon*, 101 Ill. 274; *Claffin v. Ostrom*, 54 N. Y. 581; *Stillman v. Northrup*, 109 N. Y. 475; *Everson v. Gere*, 122 N. Y. 290; *Lane v. Duchac*, 73 Wis. 655; *W. W. Kimball Co. v. Mellon*, 80 Wis. 143. The rule is, that the transfer of a note carries with it all security without any formal assignment or delivery, or even mention of the latter: *Carpenter v. Longan*, 16 Wall. 271; *Croft v. Bunster*, 9 Wis. 503. A general guaranty is one open for acceptance by the public generally. A special guaranty is limited to the person to whom it is addressed, and usually contemplates a trust or reposes a confidence in such person. Such a guaranty may not be assignable until the right of action has arisen thereon: *Jex v. Straus*, 122 N. Y. 293, distin-

guishing *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273; 45 Am. Rep. 204. The main contention of the defendants in the present case is, that the guaranty upon which the action is founded is special, and limited to W. T. Rickards & Co., and was not available to the plaintiffs, their assignees. We do not think that the construction of the guaranty in question can be thus fairly restricted. We think that the guaranty, except as expressly limited by its terms, ¹⁹⁷ was a general, continuing one. The defendants executed the contract of guaranty "in consideration of the sum of one dollar to each of us in hand paid, and in consideration of the granting of credit and discount by W. T. Rickards & Co. to the Farson & Libbey Company," in which the defendants were jointly and severally interested as owners of all or of a large proportion of the capital stock thereof, and in whose success they were, and each of them was, particularly and financially interested. In other words, they gave the guaranty to secure the indebtedness on which the action is founded, for the benefit and advantage of a company in which they were themselves thus interested. The Farson & Libbey Company were anxious to realize on the notes in suit; took the same to W. T. Rickards & Co., and negotiated, sold, and delivered the same to that company; and it granted to said Farson & Libbey Company credit, discounted such notes, and paid it therefor the full value and amount thereof, less interest and brokerage. The transfer of these notes to the plaintiffs carried with it, by operation of law, all securities for their payment. The debt is the principal thing, and the securities are only an incident. The transfer of the former, therefore, carries with it the right to the securities, and amounts to an equitable assignment of them. No matter what the form of the security is, whether a real estate or chattel mortgage, or a pledge of collateral notes, bonds, or other personal property, the purchaser of the principal takes with it the right to resort to these securities; and this is so, although the assignment or transfer does not mention them. The reason of this rule, within all the authorities, seems to be that when the mortgagee transfers the debt, without assigning the mortgage or other security, he becomes a trustee, and holds the security for the benefit of the owner of the note, and the latter may enforce the trust. The debtor is in no wise injured by such rule. He has agreed that the security shall stand for the payment of the debt, and it is of ¹⁹⁸ no consequence to him to whom it is paid. He has to pay it but once.

The guaranty is to pay any and all indebtedness to said W. T. Rickards & Co., their heirs, executors, administrators, and "assigns," incurred by Farson & Libbey Company. It is said that the word "assigns" means substantially nothing in this connection; that it is a mere formal phrase. We cannot so regard it. It either means that the defendants were to guarantee this paper in the hands of any assignee of Rickards & Co., or it means absolutely nothing. Rickards & Co. were bankers and brokers. Their business was dealing in commercial paper, both buying and selling it, all of which defendants well knew. Their purpose in giving this guaranty was to give to the Farson & Libbey Company a credit of twenty thousand dollars with these brokers. It was perfectly natural, therefore, that the brokers desired to have this paper protected, not only in their hands, but in the hands of their customers. We conclude, therefore, that this phrase was an apt one to express the real intention of the parties, and that it means precisely what it says. Rickards & Co. hold the security for these notes in trust, and the purchasers of the notes are entitled to enforce the trust. The guaranty was given for the payment of these notes, among others, and, within the rule of the authorities, it would seem that the purchasers from Rickards & Co. have the right to resort to the guaranty.

The fact that the Tidioute Savings Bank did not know of the existence of this guaranty at the time it purchased the City Sash & Door Company note is of no significance. The securities pledged for a debt follow it, in equity, no matter how the debt be modified or into whose hands it may come. Until the debt is paid, the pledge accompanies it, and remains for its payment, and is available to all who may acquire title thereto: *Colebrooke on Collateral Securities*, sec. 79; *Stearns v. Bates*, 46 Conn. 306. The guaranty in question was given to secure the payment of any and all indebtedness ¹⁹⁹ due, or thereafter to become due, to Rickards & Co., or their assigns, "growing out of or occasioned by any or through any act or acts of the said Farson & Libbey Company." The defendant used apt words to make the guaranty impersonal, so far as the holders of the debts so created are concerned. They executed and delivered a contract for all the debts created by the Farson & Libbey Company to Rickards & Co. within the amount limited, which became an incident to each such debt, and which passed to the bank pro rata, upon its purchase of the note, even though it may not have known of its existence at that time: *Keyes v. Wood*, 21 Vt. 331;

Evertson v. Booth, 19 Johns. 486. To require the defendants to pay these notes is but to require them to fulfill their promise. It entails no hardship and creates no obligation beyond the plain tenor of their contract.

The argument that the guaranty was personal with Rickards & Co., as imposing special trust and confidence in the members of that firm, falls of its own weight. A bare reference to the paper itself would seem to dispel any such illusion. The case of Evansville Nat. Bank v. Kaufmann, 93 N. Y. 274, 45 Am. Rep. 204, falls far short of sustaining their contention.

On the whole case, the conclusion of the trial court meets with our entire approval.

The greater portion of this opinion was prepared by Mr. Justice Pinney before his sickness and resignation. To him credit is due accordingly.

By the Court. The judgment of the circuit court in both cases is affirmed.

GUARANTY—ASSIGNABILITY—RIGHT OF ACTION.—A valid contract of guaranty, indorsed upon a writing which is obligatory, passes by assignment to the assignee, and vests in him a right of action in his own name against the guarantor: Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519.

GUARANTY—ASSIGNMENT OF PRINCIPAL OBLIGATION.—If a person guarantees the payment to a corporation of any and all indebtedness or liability then or thereafter owing to it from another designated person, and notes subsequently executed by the latter to the former are assigned by him together with all the securities he may hold securing any property or indebtedness, the assignee is entitled to the benefit of the guaranty, and may maintain an action thereon against the guarantor: Anchor Invest. Co. v. Kirkpatrick, 59 Minn. 378, 50 Am. St. Rep. 417, and note.

GREEN v. ASHLAND WATER COMPANY.

[101 WISCONSIN, 258.]

WATER COMPANIES—LIABILITY FOR DISTRIBUTING POLLUTED WATER—WARRANTY OF QUALITY.—A water company engaged in distributing water for compensation does not impliedly warrant the quality of the water carried and distributed.

WATER COMPANIES—LIABILITY FOR DISTRIBUTING POLLUTED WATER—KNOWLEDGE OF PERSON USING SUCH WATER.—A water company which knowingly distributes water which, from a cause not discoverable by the exercise of reasonable care, is dangerous for domestic use, it owes the duty to its customers of disclosing such danger, and a failure to do so is fraud in

law, rendering the company liable to any person injured thereby without fault on his part, and the failure of duty amounts to actionable negligence, to which the same liability is incident. But if the person injured used the water with knowledge, actual or constructive, of its dangerous condition, no liability attaches to the company.

WATER COMPANIES—LIABILITY FOR DISTRIBUTING POLLUTED WATER—EVIDENCE OF SUBSEQUENT PRECAUTIONS.—In an action against a water company for the death of a person, occasioned by using impure water furnished by it, it is improper to admit evidence that greater precautions were taken by the defendant, after the occurrence complained of to secure pure water, than were taken before.

EVIDENCE—SITUATION EXISTING AFTER INJURY COMPLAINED OF.—In an action against a water company for death occasioned by the use of impure water furnished by the defendant, it is error to admit evidence of experts as to tests made of the water some time after the occurrence complained of.

WITNESSES — EXPERTS — OPINION EVIDENCE. — Where it is sought to recover from a water company for death from typhoid fever, which disease, it is alleged, was communicated to the deceased by impure water furnished by the defendant company, expert witnesses should not be permitted to give opinions going to the question of how the disease was contracted, based upon the evidence introduced upon that question, such evidence being contradictory.

WITNESSES — EXPERTS — PHYSICIANS — CAUSE OF DEATH.—The rule that a physician may testify as to the cause of death, from personal examination or knowledge, extends no farther than the immediate cause of death, and not to what set the cause in motion.

EVIDENCE—OPINION OF WITNESSES.—In an action against a water company for injury occasioned by the defendant's furnishing impure water, it is not proper to admit opinion evidence as to the duty of the defendant with reference to testing the water supply.

WATER COMPANIES—LIABILITY FOR FURNISHING IMPURE WATER—EVIDENCE.—Where it is sought to impose upon a water company a liability for injuries occasioned by impure water furnished by it, it is error to admit in evidence newspaper comments generally irrelevant to the issue, and of a sort tending to prejudice the jury against the defendant.

WATER COMPANIES—IMPURE WATER—CONTRIBUTORY NEGLIGENCE IN USING.—Where it has been for some time a matter of common knowledge that water furnished by a water company is dangerously impure, it will be presumed that a person of average intelligence living in the community had notice of such fact, and, unless such presumption is rebutted, he will be deemed guilty of contributory negligence if he uses such water.

Action to recover damages for the death of plaintiff's intestate alleged to have been caused by negligence on defendant's part, in that it failed and neglected to extend its intake pipe into Chequamegon bay from time to time as needed to secure water free from sewage contamination as required by its contract with the municipality of Ashland. It is claimed that owing to such

breach of duty, the plaintiff's intestate, through using the water furnished by defendant, contracted typhoid fever, from which he died. Appeal from a judgment for plaintiff.

Tomkins & Merrill and Lamoreux & Shea, for the appellants.

Cate, Sanborn, Lamoreux & Park, for the respondent.

263 MARSHALL, J. This action was brought, tried, submitted to the jury, and went to judgment, upon the theory, apparently, that a recovery was claimed for the death of plaintiff's intestate on the ground of actionable negligence of defendant. Something is said in the briefs of counsel about the rule, so called, of implied warranty in the sale of provisions for immediate domestic use, as if that rule might apply to the facts. It is not necessary to consider that theory because of the manner in which the case was tried and submitted, as indicated, though it is proper, and deemed advisable as a guide in future proceedings, to discuss it. The doctrine of Sir William Blackstone that there is a warranty of the wholesomeness of provisions sold for domestic use by the buyer, and that the vendor is bound to know their quality in that regard at his peril, is controverted by the weight of authority in this country and England. Liability for damages in the circumstances mentioned is supported, but on the ground of deceit, not contract. It would be interesting, and probably constitute a valuable addition to our jurisprudence, to have the true nature of that liability definitely decided here. The writer is not familiar with any case where **264** the point has been so presented and decided that the result stands as a binding adjudication on the subject, though there are dicta here and there recognizing the rule stated by Blackstone as one prevailing in this country generally: *Getty v. Rountree*, 2 Pinn. 379; 54 Am. Dec. 138; *Williams v. Slaughter*, 3 Wis. 347.

There is a strong reason for holding that caveat emptor applies to the purchases of provisions for domestic use the same as to purchases of other articles, in the absence of express contract or of fraud; that the only difference is that the situation and relation of the parties in the one case raises an inference of artifice, while in the other it does not. In *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109, it is said, in substance, that the mistake of Blackstone was in treating deceit and fraud as breach of implied contract; that artifice must be established as the foundation of liability, and without it no liability in the

nature of that on an implied warranty exists in case of the sale of provisions any more than in the sale of any other article; that the sale of provisions for a sound price for immediate consumption involves a representation of wholesomeness, and knowledge of the falsehood, if falsehood there be, is presumed from the nature of the transaction and duties growing out of the trade; that the inference of fraud arises from the necessities of the situation, and to the deceit attaches the liability. That was affirmed in *Winsor v. Lombard*, 18 Pick. 57, where Chief Justice Shaw stated, in effect, that the supposition as to the rule of implied warranty existing in the sale of provisions any more than in the sale of other articles, is founded in failure to distinguish between a rule of evidence and a rule of law, as explained in Mr. Justice Sewall's opinion in *Emerson v. Brigham*, 10 Mass. 197; 6 Am. Dec. 109. In *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676, Bronson, C. J., speaking on the same subject, said that the dictum of Blackstone cannot be supported in its full extent; that the liability can be supported, but on the ground of deceit, citing *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109, with approval, and distinguishing *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339, a leading case often cited to the implied warranty theory and as sustaining the dictum of Blackstone. A careful reading of it shows that the sale considered was with actual knowledge of the vendor of the unwholesomeness of the article. He was guilty of a fraud and liable on that ground, and that was the real foundation of the recovery. See, further, to the same effect, *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, and *Burnby v. Bollett*, 16 Mees. & W. 644. A careful examination of the text-books on this subject shows that the writers reason along the line of *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109, and the other cases cited: Benjamin on Sales, ed. 1892, 647; Biddle on Warranties, secs. 193-204; 2 Schouler on Personal Property, sec. 348; 10 Am. & Eng. Ency. of Law, 157.

Courts in recent years have not been inclined to add new exceptions to the rule of caveat emptor, or to extend those already established. It once applied to all sales of personal property, with the one exception of warranty of title. Many exceptions have since been added, presumably under the influence of the civil law, where the rule was caveat venditor, a rule as harsh to the seller as that of the common law to the buyer. Each exception in the development of our system paved the way for

another, and that for still another, as the exigencies of particular situations seemed to require, in order to harmonize moral with legal obligations, till the rule itself ceased to be the safe and simple guide it was when Justice Popham, in pronouncing the law in his time, said, "If I have commodities which are damaged, whether victuals or otherwise, and I, knowing them to be so, sell them for good and affirm them to be so, an action upon the case lies for deceit; and although they be damaged, if I, knowing not that, affirm them to be good, still no action lies without I warrant them to be good." That a more enlightened sense of justice has softened and limited that rigorous rule is by no means to be regretted; but if a written system of laws is to be preserved at all, and the science of the law is to be found ²⁰⁶ therein, so many exceptions and limitations of a principle should not be recognized as to practically obscure it. To the one implied warranty of title, with which the rule of the common law, as indicated, commenced, has been added that in case of a sale by sample, warranty of general character where the chattel is not present and subject to inspection, warranty of manufactured goods as to merchantable quality, warranty that manufactured goods sold for a particular purpose are reasonably suitable therefor, and perhaps some others. None of the changes, however, have taken place in recent times, and as the remedy is ample to protect against frauds on the part of vendors where the vendees use reasonable care in looking after their own interests, our system, without further changes, is probably as perfect to the end that even-handed justice between individuals may be guaranteed, as it can reasonably be.

In the light of the foregoing, no reason is perceived for saying that a mere distributor of water for a compensation should be held liable as a guarantor of its quality. It is not a commodity kept for sale in the strict sense of the term, but is free to everyone, in nature's reservoirs, like light and air. It is taken directly or indirectly from a common source of supply. The immediate source, as in this case, is usually selected in advance and fixed by contract, leaving the mere service of a carrier to be performed, of taking the water from such source and distributing it to the consumers. To say that the person or corporation performing that service shall be burdened with an implied warranty of the quality of the thing carried and distributed, would be treating the transaction as a sale, strictly so called, and then applying an exception to the doctrine of *caveat emptor* not sup-

ported by good reason, or any authority we are able to find, or any to which our attention has been called. It would burden such public service in a way that would be destructive of private enterprise in that line, and render public enterprise ²⁶⁷ in the same direction so attended with dangers as to discourage a service that has become a necessity in all communities of any considerable size, and which promotes to a high degree the welfare and happiness of individuals in communities, great or small. If distributors of water under public franchises be held strictly accountable for the exercise of ordinary care not to place before their customers an unwholesome article under circumstances liable to induce persons in the exercise of ordinary care, to use it for drinking or other domestic purposes in ignorance of the dangers attending the use, and held liable for deceit in such transactions, and the law be firmly administered along those lines, the safety of individuals, as affected by public water service, will be as well promoted as is consistent with the continuance of such service, whether performed by strictly public or by quasi public agencies.

From the foregoing it will be seen that if a recovery can be sustained on the facts of this case at all, it must be on the ground of actionable fraud or negligence without contributory fault on the part of the deceased. If defendant knew, or from the situation ought to have known, the water it was distributing in the city of Ashland was dangerous for domestic use, from some cause not discoverable ordinarily by the exercise of reasonable care, it owed the duty to its customers of disclosing that danger, and a failure so to do, knowing that such customers were liable to use the water through ignorance of its character, was a fraud in law, rendering the defendant liable to legal damages to any person injured by such fraud without fault on his part, and it was also a failure of duty amounting to actionable negligence as well, to which the same liability is incident. The mere fact, if it be a fact, that it had been rendered impracticable for defendant to procure a supply of wholesome water in Chequamegon bay, as required by the contract with the city, from causes attributable to the municipality, though constituting ²⁶⁸ a defense against any action on its contract with the city or to forfeit its franchise, does not excuse knowingly pumping contaminated water from the bay and distributing the same to customers and deceiving them into the belief that it was wholesome. But, as indicated, though the conduct of the defendant be held wrong-

ful on the ground of either fraud or negligence, if the deceased knew, or under the circumstances ought to have known, the dangerous condition of the water, yet used it with the consequence complained of, no legal liability thereby attached to the defendant. If the deceased knew, and he is charged with knowledge of what a man of ordinary intelligence under the circumstances ought to have known, then he was not deceived, whatever may have been the conduct of the defendant; and for the same reason he is chargeable with contributing to the result complained of by his own want of care. So, plaintiff's cause of action, if any there be, sounds in tort however we may look at it, and knowledge, or its equivalent, on the part of the defendant, and want of such knowledge or equivalent on the part of the deceased, is essential to legal liability in the one case as well as the other, the only difference being in the manner of establishing the fault of the deceased, the affirmative of that being on the complainant if a recovery be sought on the ground of fraud, and on the defendant if on the ground of actionable negligence. The distinction between the two is exceedingly shadowy, and really not important in the practical application of principles.

The foregoing discussion and statement is deemed justified, if not called for, by the positions taken by counsel. If some of the principles contended for were applied on a new trial of the case, and it resulted favorably to the plaintiff, the misfortune of a reversal might probably follow. The danger in that regard may be avoided, guided by what has been said.

In considering the specific errors assigned, it appears ²⁶⁹ most logical to first take up the rulings complained of on the admission of evidence. First in order is that admitting proof that greater precautions to obtain pure water were taken by the defendant after the occurrence complained of than before. If defendant in fact knew the water supply was dangerously contaminated, the fact that it subsequently took means to correct the evil, as we have seen, is immaterial on that question, but the question of whether the water was impure, and whether defendant negligently failed to remedy the difficulty, were material, and determinable solely by the situation prior to the occurrence complained of. What was done afterward had no legitimate bearing on that question, and the jury had no right to draw any inference therefrom. Such evidence has been repeatedly condemned by this and other courts: *Castello v. Landwehr*, 28 Wis. 522; *Anderson v. Chicago etc. Ry. Co.*, 87

Wis. 195; Downey v. Sawyer, 157 Mass. 418; Columbia etc. R. R. Co. v. Hawthorne, 144 U. S. 202; Baird v. Daly, 68 N. Y. 547; Nalley v. Hartford Carpet Co., 51 Conn. 524; 50 Am. Rep. 47; Terre Haute etc. Ry. Co. v. Clem, 123 Ind. 15; 18 Am. St. Rep. 303; Hodges v. Percival, 132 Ill. 53; Hudson v. Chicago etc. Ry. Co., 59 Iowa, 581; 44 Am. Rep. 692; Motey v. Pickle etc. Co., 74 Fed. Rep. 155.

What has been said on the subject of evidence of precautions against sewage contamination after the occurrence complained of, applies to evidence of experts, received against defendant's objection, as to tests made of water taken from the bay some time after such occurrence. For aught that appears, the water may have been wholesome in the early part of March, 1894, and very unwholesome when the subsequent tests were made. The evidence shows that the deceased took the fever about the 1st of March, and that the height of the typhoid fever epidemic was not reached till the last of that month, there being several hundred persons afflicted in all. Under the circumstances, sufficient time had elapsed for a material change in the bay water to have taken ²⁷⁰ place. The admission of the evidence was plainly prejudicial error. True, evidence of a situation existing after an injury, though a considerable time may have elapsed, is admissible to show the situation existing at the time of the injury, if preceded by prima facie proof that no change has taken place in the meantime: Tremblay v. Harnden, 162 Mass. 383. Here that preliminary proof not only was wanting, but there was a strong case to the contrary made by the evidence.

It is further assigned for error that the court allowed opinion evidence as to facts in issue—the evidentiary facts (not for scientific controversy) relating thereto being in dispute—contrary to the settled law on the subject, and as declared in numerous decisions in this court, and recently stated in Maitland v. Gilbert Paper Co., 97 Wis. 476; 65 Am. St. Rep. 137. The following are some of the questions complained of: "You may state whether or not, in your opinion, the water furnished by the Ashland Water Company during the winter and spring of 1894 had anything to do with the typhoid fever epidemic which prevailed in the city of Ashland during that time?" "What, in your judgment, was the cause of the typhoid fever of which he [Green] died?" "You say the typhoid fever, in this case, in your opinion, was caused by drinking bay water: Do you say that from the investigations you made?" All the questions were an-

swered in the affirmative. The learned counsel for respondent say, in support of the questions, that they were proper because the effect of evidence produced in establishing controverted facts, on which opinions were given, was not involved—that such facts were not in dispute. We are unable to see the case that way. How can it be said the question was established beyond controversy that the deceased did not drink other than bay water? Let it be admitted that up to within four days from the time he was stricken with the disease, bay water was used at his working place as well as at his home.²⁷¹ How can it be assumed from that alone that he did not drink water elsewhere or come in contact with some other medium whereby the seeds of the disease were taken into his system? As to each of these points, if the evidence was such as to remove it from the realms of mere conjecture, certainly it was not established in plaintiff's favor so as to warrant taking it from the jury, and, if not, certainly the expert could not properly pass upon the evidence in giving his opinion. All the facts on which the opinions were given, except that Green died of typhoid fever, and that prior to his taking the disease he habitually used bay water for drinking purposes, were in controversy. It seems clear that opinions going to the question of how the disease was contracted could have been properly elicited only on hypothetical questions, leaving the jury free to consider such opinions after finding from other evidence the existence of the foundation facts upon which they were based.

As a second proposition, respondent suggests, with apparent confidence, that the questions were proper under the rule that a physician may testify as to the cause of death from personal examination or knowledge. That rule is familiar, but extends no further than the immediate cause of death, because, manifestly, that is the limit of scientific investigation. Failure to observe that test often leads to prejudicial error. A competent witness may testify as to whether a person came to his death by a wound found upon the body, but not as to who inflicted it, because, as said, he cannot go beyond the range of scientific investigation. This court said an expert may testify that certain injuries to a female, found on personal examination, may have been caused by a ravishment, but not that they were so caused, and, we may add, certainly not who was the guilty party: *Noonan v. State*, 55 Wis. 258. These illustrations show clearly that respondent's counsel erred in relying on the rule mentioned to sustain the

method of examination of the expert resorted to. ²⁷² That such was their reliance is evident from the the fact that they rounded out their examination by interrogating the witness as to whether he gave his opinions from personal examination. Wherever expressions are used in the books to the effect that opinion evidence of the cause of death, based on personal examination, is admissible, they will readily be seen, by a little attention to the matter, to relate solely to the immediate cause, not what set the cause in motion.

Opinion evidence was permitted against objection, as to the duty of the defendant with reference to testing the water supply. As to this, respondent's counsel answer the objectionable parts of the evidence, if there be such, were not responsive to the questions. An examination of the record fails to bear out that view. The questions were: "What, in your judgment, should the water company do with reference to ascertaining the purity or impurity of the water?" "How frequently, in your judgment, should these analyses be made?" They seem to call very clearly for opinion evidence as to the duty of defendants as regards testing the water supply. That certainly, if material at all, was a question to be determined by the jury. No ground is perceived upon which the questions can be sustained. It was competent to show by opinion evidence that the quality of the water was only determinable by certain tests, but whether legal duty required defendant to make the tests was certainly not a matter for such evidence.

The appellant further complains of a ruling, admitting in evidence an article published in an Ashland newspaper about seven months prior to Green's death, wherein the defendant was charged with distributing poisonous water to its customers and requiring the city to pay for water service twice as much as was proper, and it was suggested that the most expeditious method of dealing with defendant, in order to remedy the evils complained of, was to annul its franchise and seize its property; and it was further suggested that the ²⁷³ officers of the company should be prosecuted without leniency, civilly and criminally, if they did not voluntarily and immediately remedy such evils. There can be no justification suggested for the admission of that evidence. We have a right to assume that the learned counsel for respondent were unable to suggest any, as they did not attempt to do so. If overcharges were made by the water company, that had nothing to do with causing the death of Green

by typhoid fever, and if the death was so caused, the declarations made in a newspaper in regard to the condition of the water certainly had no possible bearing on that question. They were no more competent as evidence because made editorially in a newspaper than if made by any individual. They had no legitimate place in the trial. They were well calculated to prejudice the jury against the defendant and prevent a fair and impartial trial of the important issues between the parties on the legitimate evidence produced. An examination of the record shows that considerable other evidence, admitted over the objections of appellant's counsel, to which no particular reference is made in their brief, was irrelevant and prejudicial. This observation refers to the proceedings of the common council covering a period of about one year before Green's death and a month or two afterward. That placed before the jury the history of a bitter contest that existed between defendant and the city of Ashland, covering the period mentioned. It closed with a resolution passed some time after the death of Green, cancelling the defendant's franchise and directing the city attorney to commence proceedings to annul the same by judicial decree and to condemn the water supply. It is not claimed that any of this evidence was admissible for any purpose except to show notice to the defendant that it was claimed by the city that the bay water was unwholesome for domestic use. So little of it was relevant for that purpose, and that little so involved with matter having no bearing even on the question of notice, ²⁷⁴ and so tending to prejudice the minds of the jury unfavorably to the defendant and to prevent a fair trial, that the whole should have been rejected on defendant's objection.

The remaining question for consideration was raised by the motion for a nonsuit, the motion to direct a verdict, and the motion for a new trial. All the rulings may properly be considered together. The learned trial court correctly held that the franchise under which the defendant operated its works did not require it to go outside of Chequamegon bay for a water supply. Following that and the negligence alleged in the complaint—failure to extend the intake pipe to a point beyond the reach of sewage contamination—the court submitted to the jury these questions: "Could the defendant company have procured wholesome water from Chequamegon bay at and prior to the sickness of Green?" "Was the defendant company guilty of negligence which was the proximate cause of the death of

Green?" "Did defendant know, or ought it reasonably to have known, prior to the time when the deceased contracted the disease from which he died, that the water it furnished deceased was contaminated by typhoid germs?" To each of such questions the jury answered in the affirmative. Thus, it will be seen, the right of plaintiff to recover was made to turn on whether defendant negligently failed to extend its intake pipe into pure water in Chequamegon bay. As heretofore indicated, the mere fact of impracticability or impossibility of obtaining a pure water supply in the bay, if such were the facts, did not legally excuse defendant from knowingly distributing dangerously impure water for domestic consumption under such circumstances that persons of ordinary intelligence might probably use the same with dangerous consequences. But as that was not the theory of the pleaders in making up the issues for trial, or in the submission of their case to the jury, the case will be considered as the parties and the trial court considered it. Whether a judgment ²⁷⁵ could be sustained under the complaint and findings of fact against defendant on the other theory, is immaterial, on account of the branch touching defendant's fault which is to be considered hereafter.

Does the evidence warrant the finding that defendant failed to exercise ordinary care to procure a pure water supply from the bay? That, as indicated, is the key to plaintiff's case. We have searched the record from beginning to end, and read and reread it with the greatest care, to find such evidence, and have failed. The point was raised in appellant's brief that no such evidence exists, and no reply thereto appears in the brief of respondent. No evidence is pointed out by them upon which the findings can rest. They evidently turned, if based on evidence at all, on an unsworn report of a chemist, based in part on an unverified report of an examination made by Vaughn, of the Michigan University, of several samples of water, one of which was taken from a point about one thousand feet east of the breakwater, which point was about two miles from the pumping station. The samples were selected some time after the occurrence complained of. The one east of the breakwater was the only one found free from sewage contamination. The chemist who made the report did not place sufficient reliance thereon to recommend resorting for a supply to the place where, on the single occasion, pure water was found. He thought a supply might be found there with reasonable certainty, but expressed a

preference for going outside the bay entirely. All the sworn evidence in the case shows that if pure water was found on one occasion at a particular place, that situation might or might not continue; that the bay water was so generally contaminated with sewage, especially in the spring, that a safe supply could not be found there with any reasonable certainty. Dr. Hosmer said, if there was no current, there would be more protection; that toward Washburn, just before reaching the sewage on that side of the ²⁷⁶ bay, was the safest place, but on account of the swinging currents one could not tell anything about it; that emptying so much sewage into the bay was sufficient to condemn it as a source of water supply without any test. Some tests were made of samples taken from different parts of the bay, one being near Houghton Point, several miles from the pumping station, that being the only one free from sewage contamination. One of the experts said that it was improper to take water for dietetic use from a body of water having no current, into which the sewage of a city was drained, unless the sewage delivery and the end of the intake pipe were many miles apart. There is a large amount of evidence of that character in the record, and nothing to controvert it.

Further, it is shown that nearly a year prior to the death of Green, the officers of the city and the officers of the water company were of one mind as to the necessity of going outside the bay to get water suitable for domestic use. As early as February, 1893, an official report was made to the common council and adopted, to the effect that the intake pipe should be extended so as to take the water supply from the lake instead of the bay, and the city attorney was requested to draw a resolution formally directing the defendant to make such extension. In April, thereafter, such a resolution was drafted by the board of health and adopted by the council, and thereafter an attempt was made to condemn the water supply and annul the defendant's franchise because it did not go to the lake with its intake pipe. It clearly appears all though the proceedings of the common council, for nearly a year prior to the death of Green, that all parties understood that the bay water was unsuitable for dietetic use. During all that time a contest existed between the municipality and the defendant as to whether the latter was obliged to extend the intake pipe into the lake, it being agreed that water free from dangerous pollution could not be obtained from the bay.

277 That being the situation as to the primary parties to the contract, the situation could not be different as to private persons who became parties thereto by claiming the benefit of the contract. The verdict of the jury on the point here considered appears to be contrary to the evidence, and if a recovery on the record depends on that question, the verdict should have been directed for the defendant, and the judgment appealed from cannot stand. There is no explanation, it would seem, of the finding of the jury, consistent with the theory that it was based on evidence, except that they considered that regarding the filtration system, and did not mean to say that the water of the bay, without treatment by filtration, could at any point be depended upon as a safe source of supply.

It is further contended by appellant's counsel that the evidence conclusively shows contributory fault of deceased, precluding a recovery. As before indicated, if deceased drank the bay water with knowledge, or reasonable means of knowledge, that it was dangerously polluted with sewage, he took upon himself the risk, and the plaintiff cannot recover, whether recovery be sought on the ground of deceit or negligence. The jury found specifically for plaintiff on that point, yet said by another finding that prior to the death of Green it was publicly and widely stated, and believed, among the citizens of Ashland, that the cause of typhoid fever epidemics in the city was the impure drinking water furnished by defendant. In view of the fact, which we deem uncontroverted by the evidence, that the water was impure, and that such condition had existed for a long time and was widely and commonly known, the findings referred to are inconsistent, there being no evidence explaining why the deceased did not know of that which was a matter of common knowledge in the community where he lived. Common knowledge of a fact raises a presumption that all persons of average intelligence have notice of it. That is elementary.

278 Not only was there no proof to justify the jury in saying the deceased did not have reasonable ground to believe what they said was commonly known and believed, but there is much affirmative evidence to the contrary. He knew that the sewage of the city was drained into the bay, and that the defendant's water supply was taken therefrom. He was an intelligent, reading, workingman. He took one of the city papers wherein the dangers of taking water from the bay were discussed. He had typhoid fever in his family six months before he was stricken,

his wife being the afflicted party. She was attended by Dr. Hosmer, one of plaintiff's witnesses, who was thoroughly conversant with the condition of defendant's water supply, and who probably talked with the deceased on the subject, as he did with intelligent men generally, it being a matter of common talk. All these facts are in evidence. It is not deemed advisable to quote the evidence at length. Suffice it to say that the proof is overwhelming to the point that the bay water was dangerously polluted at the time Green was stricken with the fever, and that it had been in that condition, especially in the spring, for several years; that the facts in that regard were understood in the city generally, and had been the subject of discussion at public meetings and in the city council, and in the newspapers, and among the people for a long time. There is no evidence in the record to rebut the presumption that the deceased had notice of what was so commonly known. So we cannot escape the conclusion that the verdict of the jury on the subject of Green's contributory fault is without evidence to support it, and that the contrary is established by the evidence. For this and the other reasons mentioned the judgment appealed from must be reversed.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WATER COMPANIES—POLLUTING WATER—INCONSISTENT RIGHTS.—Two rights, which are perfectly inconsistent, cannot be enjoyed together. Thus, a canal cannot be used to carry water fit for irrigation and water unfit for irrigation at the same time, for a use of it for one of the purposes is an exclusion of the other: *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, and note.

EVIDENCE OF PRECAUTION TAKEN AFTER AN ACCIDENT is not admissible to show negligence: *Bloomington v. Legg*, 151 Ill. 9, 42 Am. St. Rep. 216, and note collecting the cases.

EVIDENCE—OPINIONS OF WITNESSES.—A witness may testify as to the proper manner of performing work where he shows a practical and actual knowledge of what was necessary to be done: *Kehler v. Schwenk*, 151 Pa. St. 505, 31 Am. St. Rep. 777.

WITNESSES—PHYSICIANS—CAUSE OF DEATH.—A physician may testify as to the cause of death in a particular case where he has made a personal examination, or the facts are properly brought to his notice by other testimony, or by hypothetical questions: See the extended note to *Hammond v. Woodman*, 66 Am. Dec. 234-240, on the entire question of expert medical testimony.

MAXWELL v. BANK OF NEW RICHMOND.

[101 WISCONSIN, 286.]

ATTACHMENT—SERVICE OF GARNISHMENT—EFFECT OF.—The service of garnishee process operates as an equitable levy upon property belonging to the principal defendant in the hands of the garnishee, which levy may be enforced against such property in the hands of any other than an innocent purchaser for value, unless such right of enforcement be waived.

ATTACHMENT—GARNISHMENT—ELECTION OF REMEDIES.—Where a plaintiff in a suit of garnishment, in which process has been served on the garnishee, having the right to prevent the garnishee from disposing of the property for which he may be liable, elects to consider the garnishee his debtor and to take personal judgment against him, he will be held to his election, and cannot follow the property or its proceeds.

ATTACHMENT—GARNISHMENT—EFFECT OF APPEAL WITHOUT STAY.—A plaintiff in garnishment having elected to sue the garnishee personally, and judgment being rendered for the garnishee, an appeal from such judgment does not operate as a supersedeas, or restrain in any way the conduct of the garnishee concerning the property of the principal defendant in his hands. To preserve his equitable lien upon such property plaintiff must have it continued by special order of court, and, such continuance not being had, such lien is not revived by a reversal of the judgment appealed from. Persons taking the property from the garnishee pending the appeal take it free from such equitable lien.

Action for money had and received by defendant from Simon-ton, garnishee, pending an appeal by plaintiff herein, who was also plaintiff in the garnishment suit, from a judgment in favor of the garnishee in a suit brought to enforce a personal liability against the garnishee.

W. F. McNally, for the appellant.

Baker & Haven, for the respondent.

288 MARSHALL, J. The judgment appealed from must be reversed, for two reasons: 1. The election to take judgment against the garnishee for the amount of plaintiffs' claim precluded them from subsequently following the property or the proceeds thereof; and 2. The equitable lien in the garnishee proceedings not being continued in any way pending the appeal, or the judgment appealed from stayed, or the garnishee restrained from executing such judgment, it protected the garnishee defendant as to anything he did pursuant thereto before it was reversed.

True, the service of the garnishee process operated as an equitable levy upon the property in the hands of Simon-ton belonging to the defendant: *Globe Milling Co. v. Boynton*, 87

Wis. 619; *Morawetz v. Sun Ins. Office*, 96 Wis. 175; 65 Am. St. Rep. 43. But it by no means follows that under all circumstances the plaintiffs could follow either the property or the proceeds thereof into the hands of other parties. A bona fide purchaser of the property without notice of the equitable lien would take it discharged of the encumbrance, and the proceeds of the property in the hands of a bona fide holder would be likewise free from any claim of the plaintiff. The protection of the plaintiff under such circumstances, against the liability of the garnishee to dispose of the property pending the proceedings, is the right to a personal judgment ²⁸⁰ against him, if that becomes necessary to protect the interest of the plaintiff; or, if the garnishee be insolvent, a restraining order may be obtained in the proceeding, preventing any disposition of the property until the further order of the court or the termination of the action, to that it may be produced for the benefit of the plaintiff if such ultimately be the judgment of the court: *Almy v. Platt*, 16 Wis. 169; *Malley v. Altman*, 14 Wis. 22; *Sweet v. Oliver*, 56 Iowa, 744. If no precaution be taken to prevent the garnishee from disposing of the property for which he may be liable, the plaintiff's reliance must be wholly on the statute which gives him the right to such a judgment as will properly protect his rights, and if, in that situation, he elects to consider the garnishee as his debtor and to take a personal judgment as the price of his equitable interest in the property, the result is the same as in any other case of election between two remedies. Once taken, it fixes the relations between the parties, and the person so electing cannot thereafter recall his act and take a different and inconsistent position: *Bank of Lodi v. Washburn etc. Power Co.*, 98 Wis. 547. Here, unless plaintiffs lost their right to hold the garnishee responsible for the property of the debtor in his hands by not controlling its possession and disposition pending the appeal, they had a right to a personal judgment against the garnishee, treating him as their debtor, or a judgment treating the property as in the custody of the court, and all persons coming into the possession of any part of the same, or the proceeds thereof, with notice of the equitable lien thereon, as liable to account therefor. They elected to take a personal judgment, and thereby waived the right, if any they had, to follow the property or the proceeds.

There can be no question but that the appeal from the judgment in favor of the garnishee did not operate as a supersedeas

or stay of proceedings under such judgment, or ²⁹⁰ restrain in any way the conduct of the garnishee defendant concerning the property of the principal defendant in his hands. Therefore, the reversal of the judgment on appeal did not revive the equitable lien upon such property. The whole scheme of the code evinces clearly the intent that there shall be no stay in the execution of a judgment carried to this court for review, except by a special order to that effect or the giving of a bond to protect the respondent, or both, according to statutory requirements. Contrary to the old practice, it is expressly provided that the mere suing out of a writ of error and the giving of a bond to make it effectual, shall not operate as a supersedeas: Stats. 1898, sec. 3045. The right of appeal is wholly a creature of the statute, and, when exercised, cannot have any greater affect as a supersedeas than the suing out of a writ of error. It is laid down as an elementary principle that a statutory appeal does not supersede a judgment or stay its execution in any way, except by compliance with the special conditions requisite thereto: 2 Ency. of Pl. & Pr. 333, and note. In that view the several sections of the statutes relating to stays on appeals were evidently designed to meet all situations where a stay, in any event, should be granted. If there be a case not covered thereby, there being no statute prohibiting it, the trial court, and this court as well, undoubtedly have inherent power to grant a stay if justice requires it, and to make such an order on proper terms as may be necessary to make the final judgment of the court effective. In case of an appeal from a judgment dismissing an attachment or dissolving an injunction, the statute provides for continuing the same pending the appeal: Stats. 1898, sec. 3061. Manifestly, in the absence of such a continuance, the reversal of the order would not revive the condition existing at the time of its entry so as to render the then prevailing party liable for his conduct in the meantime. A judgment against the ²⁹¹ garnishee protects him in complying therewith, and a reversal of it on appeal, where not superseded or stayed, is without prejudice to a compliance by the garnishee with the judgment in the meantime: Rood on Garnishment, sec. 215, and cases cited. And the same is true where the judgment appealed from is in favor of the garnishee. It discharges the equitable attachment of the property of the defendant in the principal action just as effectually as an order discharging an attachment releases the attached property from the specific lien thereon created by such attachment. To preserve

the lien, in either case, for the purpose of further proceedings, it must be continued by special order of the court and in compliance with the statute governing the subject, or the direction of the court, where not regulated by statute. It follows that if a judgment be rendered in the court of original jurisdiction in favor of the garnishee, and the lien of the plaintiff be not continued pending an appeal or review on writ of error, and the garnishee treat the property sought to be reached as free from the equitable lien pending the proceedings, and by reason of a reversal of the judgment the cause proceeds to a new trial, he should be allowed to plead the disposition of the property while discharged of the lien, as a defense: *Webb v. Miller*, 24 Miss. 638; 57 Am. Dec. 189.

The result of the application of the principles stated in the foregoing to the case before us is that the defendant came rightfully into possession of the money received from Simonton, has a right to retain the same, and that plaintiffs have no claim thereto whatever. The judgment in favor of Simonton discharged the equitable lien of plaintiffs, and it was not revived by a reversal of the judgment to the prejudice of the garnishee defendant or those dealing with him. The lien not being continued pending the appeal, it was lost beyond recovery by the disposition of the property pursuant to the judgment discharging the garnishee. The judgment ²⁹² of the trial court to the contrary was erroneous and must be reversed.

By the court. The judgment of the circuit court is reversed, and the cause remanded, with directions to dismiss the complaint and to render judgment in favor of the defendant for costs to be taxed according to law.

ATTACHMENT—GARNISHMENT—LIEN.—The garnishment by the plaintiff of a debt due the defendant creates an inchoate right to a lien upon the property of the garnishee: *Montana Nat. Bank v. Merchants' Nat. Bank*, 19 Mont. 586, 61 Am. St. Rep. 532, and note; *Hulley v. Chedic*, 22 Nev. 127, 58 Am. St. Rep. 729.

ATTACHMENT—GARNISHMENT—EFFECT OF.—A garnishment of a warehouseman, having personal property of the defendant in his possession, charges such warehouseman with the responsibility of retaining the property as in the custody of the law, in order that it may be applied to the satisfaction of the debt on which the garnishment was placed: *Cooley v. Minnesota etc. Ry. Co.*, 53 Minn. 327, 39 Am. St. Rep. 609. Where a sheriff attaches a vessel which passes into the hands of a stranger with knowledge of the attachment, the lien of the attaching creditor will, in equity, be allowed to follow the vessel, and attach itself to the money in the hands of such stranger, for which the vessel was sold by him: *Norton v. Hixon*, 25 Ill. 439, 79 Am. Dec. 338.

APPEAL—NOT OPERATE AS A SUPERSEDEAS.—An appeal does not operate as a supersedeas and stay the execution of a mandamus: *Pinckney v. Henegan*, 2 Strob. 250, 49 Am. Dec. 592.

ANDERSON v. HAYES.

[101 WISCONSIN, 538.]

LANDLORD AND TENANT—DANGEROUS CONDITION OF LEASED PREMISES—LIABILITY OF LANDLORD.—The lessor of premises containing an elevator which is dangerous, owing to a secret mechanical defect, known to the lessor, but not discoverable by the lessee in the exercise of reasonable care, is liable to employés of the lessee for injuries received in operating the elevator and resulting from such secret defect.

ELEVATORS — DEFECTIVE — INJURIES RESULTING THEREFROM—CONSTRUCTION OF PLEADING.—In an action for injuries sustained in operating an elevator which contained a secret defect alleged to be unknown to plaintiff, an allegation that the elevator would not sustain the weight ordinarily and usually placed upon it, but would drop to the ground, and was thereby a nuisance, will be construed as meaning that the elevator was liable to fall at any time in the course of the ordinary and necessary use thereof, and not as meaning that the elevator fell whenever used, so that all who used it must have known of the defect.

Action by employés of lessee of premises containing an elevator against the lessor for injuries received while operating such elevator. Appeal from judgment for plaintiffs.

Ross, Dwyer & Hanitch and George B. Hudnall, for the appellant.

O'Brien & Vaughn and John Jenswold, Jr., for the respondent.

543 WINSLOW, J. These are actions by the employés of a tenant against the landlord for injuries resulting, as it is claimed, from a concealed defect in the demised premises, known to the landlord, but not known by, nor disclosed to, the tenant, nor capable of being ascertained by the tenant by a reasonably careful examination of the premises. The principle is well settled that a tenant takes leased premises in the condition in which they happen to be when leased, and that the landlord is not liable to the tenant for injuries resulting from lack of repair unless he has contracted to repair, or unless the defect be a concealed one known to the landlord and not disclosed to the tenant and

not discoverable by the use of that degree of care which the law demands; and it is equally well settled that an employé, servant, or subtenant of the tenant has no greater rights as against the landlord than the tenant himself: *Cole v. McKey*, 66 Wis. 500; 57 Am. Rep. 293. The rule is thus stated in *Cowen v. Sunderland*, 145 Mass. 363; 1 Am. St. Rep. 469: "Where there are concealed defects attended with danger to the occupant, and which a careful examination ⁵⁴⁴ would not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs." The rule is also recognized and stated in 2 Wood on Landlord and Tenant, section 381, and numerous cases are there cited in its support.

We think the allegations of the present complaint bring the case within the rule. The concealed defect was in the size of the grooves in the clamp which held the rope above the elevator. It is alleged to have been known to the landlord and not disclosed to the tenant, nor discoverable by him save upon particular inspection and examination. This we take to mean substantially taking the clamp off and examining the size of the groove, because it is evident that mere inspection from outside would not disclose the size of the groove, which was necessarily closed over the rope. We do not think that the rules of reasonable care go so far as to require the taking apart of machinery provided for such a purpose.

It is argued that the allegation to the effect that the elevator would not sustain the weight which was ordinarily and usually placed upon it, but would drop to the ground, and was thereby a nuisance, must be construed as meaning that the elevator fell whenever it was used, and hence that all who used it must have known of the defect. We do not regard this construction, however, as reasonable, especially in view of the fact that it is alleged that the plaintiffs had no knowledge of the defect in the elevator or of the dangers in its use. The allegation evidently means that the elevator was liable to fall at any time in the course of the ordinary and necessary use thereof.

By the Court. Orders affirmed.

Bardeen, J., took no part.

LANDLORD AND TENANT — CONDITION OF LEASED PREMISES—LIABILITY OF LANDLORD.—At landlord does not owe to a lessee, nor to the servants or employés of the lessee, the duty of making an examination of the leased premises before turning them over to the lessee, for the purpose of determining whether appliances used therein are in such a condition that no injury shall result therefrom to the lessee or his employés from their being out of repair or weakened by the use already made of them, where the lessee, by reasonable effort, could have discovered and guarded against danger as well as the lessor: *Whitmore v. Orono Pulp etc. Co.*, 91 Me. 297, 64 Am. St. Rep. 229, and note. But a landlord is answerable to his tenant for injuries received by the latter from hidden defects in the leased premises existing at the date of the lease, of which he was ignorant, and of which the landlord knew, or might have known, had he exercised reasonable care and diligence. This liability does not rest upon contract or warranty, but on the obligation implied by law that the landlord will not expose the tenant or the public to danger, of which he knows, or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence: *Willcox v. Hines*, 100 Tenn. 538, 66 Am. St. Rep. 770, and monographic note thereto; *Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761.

PORTANCE v. LEHIGH VALLEY COAL COMPANY.

[101 WISCONSIN, 574.]

MASTER AND SERVANT—DUTY OF MASTER TO SERVANT.—The duty of a master to his servant is to provide him reasonably safe and proper tools, implements, and apparatus with which to work, reasonably competent and careful coemployés, and a reasonably safe place to work.

MASTER AND SERVANT—DANGEROUS EMPLOYMENT—DUTY OF MASTER—DELEGATION OF DUTY.—When an employment is in its nature perilous, it is the duty of the master to provide reasonable and necessary precautions and safeguards against such perils, and no delegation of that duty can relieve him from responsibility for failure to perform it.

MASTER AND SERVANT—WARNING OF STARTING OF MACHINERY—NEGLIGENCE OF FELLOW-SERVANT.—In entering upon an employment a servant assumes the risk of the negligence of fellow-servants, and if the master properly selects such a fellow-servant to give warning of the starting of machinery, and instructs him for that purpose, he is not responsible for the negligence of such servant in the performance of such duty, resulting in injury to a coemployé.

MASTER AND SERVANT—PRECAUTIONARY REGULATIONS—ASSUMPTION OF RISK.—A servant of ten years' experience in the unloading of coal from vessels, who has worked in a particular employment of that kind, where all the conditions are the usual ones, for several months, will be held to have assumed any risk arising from a lack of precautionary regulations prescribed by his master.

MASTER AND SERVANT—FELLOW-SERVANTS.—In unloading coal from a vessel, servants engaged in the common under-

taking, under common direction and command, with no right of control one over the other, as the scraper-man, whose duty it is to start the machinery, the hatch-man, whose duty it is to signal the starting of machinery by the scraper-man, and to give warning to servants in the hold of the vessel, and other servants engaged in the common undertaking, are fellow-servants.

APPEAL—ERROR—REVOKING ORDER OF NONSUIT.—It is not error for a court to withdraw its order of nonsuit and direct a verdict instead, in an action for negligence, where no change in the situation of parties has intervened and the jury has not been discharged.

In August, 1896, the defendant was operating an extensive coal dock at the city of Superior, and the plaintiff was employed as one of a gang unloading coal from a vessel. A man known as a hoister raised the coal buckets from the hold of the vessel, starting the machinery by a lever. On the dock a scraper-man operated similar machinery in emptying the buckets. Among the general employés, besides the plaintiff, were a rigger, who looked after the adjustment of tackle, ropes and other apparatus, and a hatch-man, who stood at the hatch and communicated between the men in the hold and the hoister and scraper-man, signalled the starting and stopping of machinery by the latter, and warned the men in the hold of anything endangering them. Plaintiff, being injured by the unexpected starting of the machinery, brought suit. Appeal from judgment for defendant.

Alexander Athey and O'Brien & Vaughn, for the appellant.

Ross, Dwyer & Hanitch, for the respondent.

578 DODGE, J. 1. The duty of a master to his servant is definite and clear. It is to provide him reasonably safe and proper tools, implements, and apparatus with which to work, reasonably competent and careful coemployés, and a reasonably safe place to work. These duties being performed, the result of any accident must be borne by the servant. If he would seek to make the master liable, he must prove an omission or failure in some one of these three respects. The question, therefore, is whether the evidence in this case—given all the weight to which in any respect it can be entitled—did establish any such failure.

There is no claim or suggestion that the machinery or apparatus was defective either in character or repair. There is no suggestion that any of the coemployés were lacking in that character for skill and caution which is required, nor of any lack of care in the defendant or its representative in their selection. It is, however, strenuously argued that there was a failure

in the defendant's duty to make the place of labor safe, in that notice or warning of the starting of the scraper machinery was not given to the plaintiff. The contention of the plaintiff below, and his principal contention in this court, was that the master, recognizing the necessity of providing for such warning as an element of ⁵⁷⁹ safety of place, had employed a man known as a hatch-tender for the purpose and with the duty, amongst others, of giving the warning, and whom it thereby constituted its representative or agent to perform the duty of giving warning for it, and that such hatch-tender failed to perform his said duty. He argues that this was a delegation to the hatch-man of a duty resting on the master, and, therefore, that the former's negligence is imputable to the latter.

This position involves a confusion of ideas. It is undoubtedly true that, when the employment is in its nature perilous, it is the duty of the master to provide reasonable and necessary precautions and safeguards against such perils, and that no delegation of that duty can relieve him from responsibility for failure to perform it. If injury to employes is to be apprehended from starting of machinery, or from passage of cars, as in *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905, and that danger can be avoided by reasonable precautions in the way of warning or otherwise, it may well be the duty of the master to make provision and give direction for such precautions; but, when he does so, he fulfills his duty. If reasonable care would require that a coemployé be provided to give warning, it would be necessary for the master to provide one; but, if he properly selected and instructed a competent man for that purpose, he would no more be responsible for a failure of the warning through negligence of such servant than he would for the results of the negligence in performance of any other duty by a coemployé. That is one of the risks assumed by the other servants: *Dahlke v. Illinois etc. Co.*, 100 Wis. 431.

This was the full scope of the decision of this court in *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905. The only point there decided was that the question should have been submitted whether the company had prescribed sufficient regulations to guard against injuries to its employes from moving about cars in its yards: *Smith v. Chicago etc. Ry. Co.*, ⁵⁸⁰ 91 Wis. 503, 505. If there is anything in the opinion in that case which can be construed as holding that, after due and sufficient regulation providing for precautions by a fellow-servant,

his negligence could impose liability on the employer, such construction is contrary to the well-settled law of this state, and not intended in that case.

The rule on this subject is well expressed and illustrated in *Hartvig v. N. P. L. Co.*, 19 Or. 522: "As it is the duty of the master to furnish a reasonably safe place for his servant to work, it became the duty of the defendant company to provide such reasonable rule or regulation in the conduct of the business as would protect the men while engaged in their work at the foot of the chute. It required the defendant not simply to employ skillful and competent agents and employ  s in its service, but to adopt rules and regulations adapted to the dangerous nature of the business, so as to guard against accidents; in a word, to be vigilant in the use of means, and in the adoption of measures, to make the servants reasonably safe in their employment. To this extent the master assumes the risks, while the servant assumes the natural and ordinary risks incident to the business in which he is engaged, including those arising from the negligence of his fellow-servants."

The rule here announced does not at all infringe the other well-settled doctrine that in providing the safe place to work, as in building a scaffold or putting in place timbers to which tackle is to be attached (*Jarnek v. Manitowoc etc. Co.*, 97 Wis. 537), the duty of the master is satisfied only by actual performance, whether he does the work with his own hands or through servants, even though the latter may also afterward work with the plaintiff in the service, depending on the safety of such preliminary structures or appliances: See *Cadden v. American Steel Barge Co.*, 88 Wis. 409, 417; *Smith v. Chicago etc. Ry. Co.*, 42 Wis. 520, 526.

In this case, there is absolutely no evidence of any lack of ⁵⁸¹ precautionary regulations prescribed by the defendant; although, if such contention were made, it would be rendered immaterial by the fact, fully apparent, that the conditions were all the usual ones, and the defendant, a man of ten years' experience in such service, had worked under them from the spring until August, and must be held to have assumed any risk therefrom. The injury in this case resulted, so far as the evidence goes, from the negligence of the scraper-man in starting his machinery without signal from the rigger, with whom plaintiff was working. If, as plaintiff contends, it also resulted from the omission of the hatch-man to give warning, no liability of the

defendant results, for the hatch-man, as also the scraper-man, were clearly fellow-servants with plaintiff, all engaged in the common undertaking of unloading the coal from the same boat, and under common direction and command, with no right of control one over the other: *Prybilski v. Northwestern Coal Ry. Co.*, 98 Wis. 413; *Foley v. The Peninsular*, 79 Fed. Rep. 972; *Luebke v. Chicago etc. Ry. Co.*, 63 Wis. 91; 53 Am. Rep. 266; *Ocean S. S. Co. v. Cheeney*, 86 Ga. 278. It should be noted in passing, however, that much which is said as to the giving of notice by the hatch-man as a protection to the plaintiff is misleading and confusing. If, as appears to be established by plaintiff's evidence, the scraper-man started his machinery without a signal, no hatch-man, however vigilant, could give any effective warning. The pressing of the lever by the scraper-man, and the starting of the rope, to the injury of plaintiff, were necessarily instantaneous. No observation by the man at the hatch could be communicated to the man in the hold so quickly as the motion was communicated to the rope. No matter what duties the hatch-man may have had to give warning of danger, they could have no application to a danger like this, the effect of which, in the nature of things, was as instantaneous as his earliest possible discovery of it.

2. Error is alleged because the court, upon motion to direct ~~582~~ a verdict for defendant, first announced, "Nonsuit granted," and then withdrew that decision and directed a verdict. This was done practically at once, before any change in the situation of the parties had taken place, and before the jury had been discharged. True, the noon recess had intervened, but nothing else. We can see no error in this. Surely, a moment for *locus poenitentiae* must be allowed courts. It certainly cannot be held that the moment a judge announces a conclusion he is at once foreclosed from any further consideration. Nothing is more common than for counsel to suggest impropriety of some order or decision when announced, and for the judge to modify it. It would have been entirely competent for the court, after announcing the granting of nonsuit, to have changed his mind, either on a reason suggested by counsel or one occurring to himself, and to have then submitted the case to the jury.

3. Numerous exceptions to exclusion of questions on cross-examination have been pressed upon our attention as errors. We have examined them all carefully, and, while in one or two instances the restrictions on plaintiff's cross-examination were

somewhat severe, we do not think the discretion of the superior court was abused. Most of the excluded questions related to matters already fully covered by the cross-examinations. Others merely inquired whether the witness had already testified to certain facts. Still others were so worded that a direct answer would be capable of misconstruction. A question to Anderson, the hatch-man, as to whether he could have seen a signal if given, might have been permitted, but its exclusion could not prejudice plaintiff. He had testified that he saw none, and, if his failure was due to his negligence, that could not promote plaintiff's case.

We discover no prejudicial error, and no evidence tending to prove negligence of defendant.

By the Court. Judgment affirmed.

Bardeen, J., took no part.

MASTER AND SERVANT—GENERAL DUTY OF MASTER TO SERVANT.—A master must use due care in supplying his servants with safe appliances, and a safe place in which to work. He cannot escape liability by delegating these personal duties to another: *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621; *Channon v. Sanford Co.*, 70 Conn. 573, 66 Am. St. Rep. 133, and note; *Kennedy v. Chase*, 119 Cal. 637, 63 Am. St. Rep. 153, and note; *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396, and note; *McMahon v. Ida Min. Co.*, 95 Wis. 308; 60 Am. St. Rep. 117, and note.

MASTER AND SERVANT—DUTY OF MASTER—DELEGATION OF DUTY.—The duty of a master to provide his servant with reasonably safe appliances and places to work is a personal one, and he cannot, by delegating it to another, absolve himself from liability for its nonperformance: *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38; *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621.

MASTER AND SERVANT—ASSUMPTION OF RISKS—FELLOW-SERVANTS.—A servant assumes the risk of the negligence of his fellow-servants, but not that of the master: *Handley v. Daly Min. Co.*, 15 Utah. 189, 62 Am. St. Rep. 916, and note; *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791, and note. The master is liable if the servant is incompetent, and this is known, or should be known, to the master: *Park v. New York Cent. etc. R. Co.*, 155 N. Y. 215, 63 Am. St. Rep. 663; *Chicago etc. R. R. Co. v. Champion*, 9 Ind. App. 510, 53 Am. St. Rep. 357.

MASTER AND SERVANT—WHO ARE FELLOW-SERVANTS.—Fellow-servants are those who are so far working together as to be practically co-operating, and who have an opportunity to control or influence the conduct of, and who have no superiority over, one another: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436, 52 Am. St. Rep. 896, and note; *Moore Lime Co. v. Richardson*, 95 Va. 326, 64 Am. St. Rep. 785, and note.

MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY OF MASTER TO PROVIDE RULES.—A person of mature years

taking employment is presumed to assume the hazards thereof, and his master is not liable for a failure to instruct him unless the master knew, or had reason to believe, that the servant was ignorant of, or incapable of comprehending the dangers of the service: *Peterson v. New Pittsburg Coal etc. Co.*, 149 Ind. 260, 63 Am. St. Rep. 289, and note. But where the master is engaged in a complex business requiring definite rules for their protection, it is his positive duty to adopt rules for the protection and safety of his employes: *Moore Lime Co. v. Richardson*, 95 Va. 326, 64 Am. St. Rep. 785.

DELAFIELD v. SMITH.

[101 WISCONSIN, 664.]

BROKERS—SALES IN BROKER'S NAME—LIABILITY OF PRINCIPAL.—Where an agreement between a broker and his principal for the sale of fruit does not authorize the former to make contracts of sale in his own name, but makes him a mere agent to sell on commission, the principal is not liable to him for losses sustained by reason of the principal's refusal to ship fruit to fill such contracts, because of which refusal the broker purchased fruit at excessive market rates to fill the contracts; but if the principal approved such contracts he is liable to the broker for commissions thereon.

Dunwiddie & Wheeler, for the appellant.

Fethers, Jeffris & Mouat, for the respondent.

665 CASSODAY, C. J. It appears from the record that, during the times mentioned, the plaintiffs were copartners, doing business as commission merchants at New York, Chicago, St. Louis, and San Francisco; that the defendant was engaged in packing and shipping fruit from San Francisco to different parts of the country; that February 7, 1890, the plaintiffs and defendant entered into an agreement in writing, wherein and whereby the plaintiffs were made the sole and exclusive sales agents for the defendant in all the territory of the United States and Canada east of the Rocky Mountains, except Kansas City, and the defendant thereby agreed to pay them on all goods shipped by the defendant into such territory, whether sold by them or not, five per cent commission on the selling price of all goods shipped or consigned, and, in addition thereto, all proper charges against such goods, such as freight, cartage, storage, insurance, et cetera, as well as interest at the rate of eight per cent per annum on all advances on such goods; that the plaintiffs therein agreed to act as the defendant's agents in the sale of all his product of canned

fruit, and to make advances against shipments or sales to the extent of seventy-five per cent of the market or selling value; that such advances were to be made by their acceptance of the defendant's drafts with documents attached, at ten days' sight; that, so far as the then present stock on hand was concerned, the advances were to be sufficient to liquidate the amount due the Bank of California against each shipment, provided such amount should not exceed the net selling value, with commissions deducted; ⁶⁶⁶ that the plaintiffs therein also agreed to assume the guaranty of payment for goods after they had been delivered and accepted by the purchaser; that it was thereby mutually agreed that sales for future shipment were to be made as the defendant might direct, he holding himself liable for all claims arising from nondelivery, delay in shipment, difference in quality, short weight, or any other justifiable cause, but sales of goods, whether to arrive or spot, upon which the plaintiffs might have made advances, to be sold at their discretion; that the proceeds of sales were to be applied: 1. To the liquidation of all charges against the goods, such as freight, cartage, storage, insurance, et cetera, and the commission therein provided for; and 2. To the liquidation of advances made by the plaintiffs; that the surplus of the proceeds of any sale or consignment was to be applied to the liquidation of the deficit in others, if any; that May 28, 1890, the parties entered into a new written agreement to the same effect, except that the five per cent commission was to be "on the f. o. b. San Francisco selling price."

About January 1, 1891, the plaintiffs commenced this action on such two contracts, and the complaint alleged as a breach of such contracts that the plaintiffs had in 1890 entered into contracts for the sale and delivery of canned goods at the prices therein specified, to be furnished by the defendant, whereby the plaintiffs obligated themselves for the performance of such contracts and the delivery of such goods; that thereafter the defendant refused to supply them with the goods they had so sold and agreed to deliver; that they were obliged to, and did, go upon the market and purchase goods to fill part of the contracts so made by them; that, by reason of an advance in price, they were obliged to pay for the goods so purchased \$2,604 over and above the amount for which the defendant had so agreed to furnish them and at which he had directed the plaintiffs to sell; that, as to parts of the contracts so made by them with other purchasers, ⁶⁶⁷ upon such refusals of the defendant they settled with the

purchasers, and were obliged to pay, in such settlements, the difference in price between the market value at the time of settlement and at the time at which the goods should have been delivered, which difference amounted to \$2,590; that they were also entitled to a commission of five per cent upon the selling price, to wit, \$255.75.

The defendant answered by way of admissions and denials, and alleged, in effect, that after he had constituted the plaintiffs his agents, and after they had sold a large quantity of goods, they violated their agreement by retaining part of the proceeds of the sales which they should have accounted for and paid over, and made unauthorized, wrongful, and unlawful charges and deductions, and wholly failed to render any account for certain sales made by them, and otherwise violated their contract with the defendant; that thereupon he promptly notified them that he would make no further shipments unless they fully accounted and paid over to him the proceeds of the sales they had wrongfully retained; that upon their refusal to so account and pay over, and by reason of the breach on their part of the agreements, he refused to make any further shipments to them. The answer further alleged, by way of a first counterclaim, that the plaintiffs had sold a large quantity of his canned goods, and received therefor \$2,619.06, which they had wrongfully retained and refused to pay over; and, as a second counterclaim, that November 6, 1890, the plaintiffs purchased certain goods of him, specified in the written agreements, and, after receiving and accepting the same, except 150 cases of apricots and 550 cases of Crawford peaches, in violation of their written agreements refused to accept, receive, or pay for such apricots and peaches, by reason of which the defendant was damaged in the sum of \$1,326.95. The plaintiffs replied to each of the counterclaims by way of denials.

668 The cause was thereupon referred to Moses S. Prichard, Esq., to hear; try, and determine; and upon the trial thereof it was stipulated in writing, by and between the parties thereto, in effect, that the plaintiffs had sold the fruits mentioned in the complaint at the prices therein stated; that the defendant had refused to deliver the fruit, and the plaintiffs were obliged to, and did, purchase such fruit, and pay the market price and value thereof to fill such sales, and that the plaintiffs sustained loss on such sales as stated; that, as to the last five items, it was admitted that the plaintiffs sold the fruits at the prices therein

mentioned; that the defendant refused to deliver the fruits, and that the plaintiffs settled with the purchasers at the market value at the time the delivery was agreed upon between the plaintiffs and the purchasers, and that the plaintiffs paid such purchasers the difference between the price the goods were sold at and the market value, in lieu of the delivery of the fruit; that the plaintiffs lost thereby the amounts stated in the complaint.

At the close of the trial before the referee, he found, as matters of fact, in respect to the causes of action alleged in the complaint, in accordance with such stipulations, and that, of such sales so made by the plaintiffs as agents for the defendant, and for and on behalf of the defendant, the defendant confirmed, approved, and ratified nine orders therein mentioned, upon which there was an aggregate loss of \$3,162.50; that the plaintiffs were entitled to commissions upon such orders and sales so made, in the sum of \$66. As to the first counterclaim, the referee found, as matter of fact, in effect, that the defendant was entitled to the balance upon the sale of 350 cases of Criterion peaches, shipped September 1, 1890, amounting to \$395.25, with interest thereon from September 1, 1890; that the defendant was also entitled to the balance due from the New York house of the plaintiffs of \$550.98, with interest thereon from September 23, ⁶⁶⁹ 1890; that, as to all other items in the first counterclaim, there had been charges made by the defendant, statements rendered, balances struck, and that the defendant did not intend to charge back any of them until after the commencement of this suit; that the defendant's account of all the recharges and the charges back of commissions, interest, freight, telegrams, and storage therein mentioned were made up by the defendant after the commencement of this action, and contrary to the contracts between the parties, and contrary to the accounts rendered by the plaintiffs and accepted by the defendant; and that as to all such items in the first counterclaim, except the two allowed, there was no intention on the part of the defendant to make any such charges against the plaintiffs until after the commencement of this suit; and that such items and each of them were not sustained by the proofs, and were contrary to the contracts; and that each of them was settled and determined by the parties prior to the commencement of this action.

As to the second counterclaim, the referee found, as to matters of fact, in effect, that the defendant had orders to deliver all goods actually purchased by the plaintiffs from him; that

December 3, 1890, the plaintiffs notified the defendant that they would not take any more goods than they had already taken; that there was not sufficient proof as to when the balance of such goods were sold by the defendant, what prices they were sold at, what damages, if any, he sustained, what the market value was at the time the plaintiffs received the goods (if they received them at all), and that there was no basis for the allowance of any such counterclaim; that as to all the rest of the several items of the counterclaims of the defendant, except the two items mentioned, the referee disallowed them; that the plaintiffs were entitled to recover such damages, particularly found, with interest thereon, amounting to \$4,316.85; that the defendant was entitled to the reduction of such claim by reason of the ⁶⁷⁰ two counterclaims found in favor of the defendant, with interest thereon as found, amounting to \$1,270.26; that the balance due to the plaintiffs May 29, 1896, from the defendant, after the deduction of the counterclaims allowed, was \$3,046.59.

As conclusions of law, the referee found that the plaintiffs were entitled to judgment against the defendant for the sum of \$3,046.59, as of May 29, 1896, with the costs and disbursements of this action. Such findings of the referee were fully confirmed by the court, and judgment ordered thereon accordingly. From the judgment entered thereon accordingly the defendant brings this appeal.

1. The theory of the complaint is that, under the agreements mentioned, the plaintiffs, as agents of the defendant, sold, in their own names, the several cases of fruit therein mentioned, to be shipped by the defendant to the parties who had purchased the same of the plaintiffs, at Bay City, Michigan, Charleston, West Virginia, Parkersburg, West Virginia, Muscatine, Iowa, Cleveland, Ohio, and Defiance, Ohio; and that after such contracts of sale by the plaintiffs, to be so delivered by the defendant, the defendant, in violation of his agreements, refused to ship any of such goods, and the plaintiffs thereby suffered loss. The stipulation mentioned is to the same effect. Undoubtedly, such refusals to ship the goods called for by such orders as the defendant had approved made the defendant liable to the plaintiffs for the amount of commissions they would have received had such goods been shipped. But the serious question recurs whether, under the agreements with the defendant, he was liable to the plaintiffs for losses on such contracts of sale which

they had so made in their own names with such other parties. After careful consideration, we are constrained to hold that he was not liable for such losses. The agreements with the defendant did not authorize the plaintiffs to make contracts of sale in their own names. They were mere agents ⁶⁷¹ or brokers to sell on commission all goods shipped by the defendant into the territory named. Had the defendant accepted orders taken by the plaintiffs from such other parties, then, undoubtedly, the defendant would have been liable to such other parties for any breach of such contracts of sale. But the defendant had no contract relation with such other parties. On the theory of the complaint, the defendant had no agreement with the plaintiffs except as stated. The plaintiffs' agency was founded upon and created by the express agreement of the parties. Under such agreement, they were authorized to represent and act for the defendant in his business dealings with third persons in making such sales: *Mechem on Agency*, sec. 1. A broker is an agent of his employer, and he differs from a factor in that he does not ordinarily have the possession of the property which he is employed to sell, and his contracts are always made in the name of his employer: *Mechem on Agency*, secs. 13, 927; *Edgerton v. Michels*, 66 Wis. 130, and cases there cited. On the other hand, a factor is intrusted with the possession of the goods, and may sell the same in his own name: *Mechem on Agency*, secs. 13, 927. Thus, it is held that, where a broker sells goods without disclosing the name of his principal, he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the broker to him against the demand for the goods made by the principal: *Baring v. Corrie*, 2 Barn. & Ald. 137. That case is approved by more recent cases in England and this country: *Drakeford v. Piercy*, 7 Best & S. 515, 519; *Pearson v. Scott*, L. R. 9 Ch. Div. 198, 203; *Cooke v. Eshelby*, L. R. 12 App. Cas. 271, 275; *Higgins v. Moore*, 34 N. Y. 417, 419. In this last case it was held that "authority given to a broker to sell property does not include authority to receive payment for the same, especially when the principal is known to the vendee." There is nothing in the complaint, nor stipulation, nor the findings of the court, to indicate that the agreements of February 7, 1890, and May 28, 1890, were ever ⁶⁷² modified or changed. We must, therefore, hold that the plaintiffs cannot recover for any of the losses alleged in the complaint, except for the loss of commissions.

2. As to the findings of fact in respect to the first counterclaim, we are constrained to hold that they are sustained by the evidence. All items therein mentioned, except the two allowed, appear to have been fully settled and determined by the parties before the commencement of this action.

3. As to the second counterclaim, the court found that the evidence in the record failed to furnish any basis for the allowance of damages for the breach alleged. We cannot say that such findings are not supported by the evidence.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in accordance with this opinion. In taxing costs, the defendant will only be allowed for printing 100 pages.

Bardden, J., took no part.

BROKERS—SALE IN BROKER'S NAME.—A broker cannot make a contract in his own name without the knowledge and consent of his principal that will bind both the principal and the other contracting party, or render the principal liable for commissions or damages for the nonperformance of the contract, though he receives a benefit from it: *Hass v. Ruston*, 14 Ind. App. 8, 56 Am. St. Rep. 288. See the monographic note to *Walker v. Osgood*, 93 Am. Dec. 171.

BROKERS—CHANGE IN TERMS OF SALE—RATIFICATION BY PRINCIPAL.—Although the terms of sale made by a real estate broker differ from the original terms agreed upon by himself and the owner, he may recover his commission, if the terms upon which he sells are accepted by the owner: *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234, and note.

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ACTION.

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ADOPTION.

1. ADOPTION — STATUTORY CONSTRUCTION. — Adoption statutes are humane provisions which look primarily to the interests of children, and every reasonable intendment should be indulged in, in case of doubt, in the line of promoting that object. (*Parsons v. Parsons*, 894.)

2. ADOPTION—JUDGMENT OF—ESTOPPEL TO ATTACK.—After the lapse of many years, during which time the status of the subject of adoption has been recognized as legally fixed by the judgment, by all parties to the proceedings, one of those parties, on whose motion the judgment was rendered, is in no position to appeal to equity to declare it void. (*Parsons v. Parsons*, 894.)

3. ADOPTION — PROCEEDINGS IN — COLLATERAL ATTACK.—Where a proper petition has been filed in adoption proceedings, the court acquires jurisdiction to determine whether the person who signs as next of kin is such, and its determination, whether based upon sufficient evidence or not, cannot be collaterally attacked for want of jurisdiction. (*Parsons v. Parsons*, 894.)

4. ADOPTION—NOTICE TO ABANDONING PARENT.—Under a statute authorizing the adoption of a child without notice to an abandoning parent, notice to such parent is not requisite to a valid determination of the fact of abandonment as regards all other parties to the proceedings. (*Parsons v. Parsons*, 894.)

5. ADOPTION — CONSENT OF ABANDONING PARENT.—Statute may authorize the adoption of a child without the consent of an absent or abandoning parent, and adoption proceedings had thereunder, and completed without notice to, or consent of, such a parent, are valid. (*Parsons v. Parsons*, 894.)

ADVERSE POSSESSION.

See Cotenancy, 1-3, 7.

AGENCY.

1. AGENCY—NEGLIGENCE OF PRINCIPAL—ERRONEOUS TELEGRAM.—Where a principal, being in doubt as to the meaning of a telegram from his agent relating to the matter of the latter's agency, requires the telegraph agent to have the message repeated and the latter reports that the message as received is correct, the principal is not guilty of contributory negligence, as a matter of law, in acting upon the message as he understands it. (*Hasbrouck v. Western U. T. Co.*, 181.)

2. AGENCY — AUTHORITY OF AGENT — ERRONEOUSLY TRANSMITTED TELEGRAM.—Where an agent, sent by a banking firm to settle and adjust a claim against a third person, telegraphs his principal: "Has stock twelve hundred dollars. Mortgage on for fifteen hundred dollars. Am offered note, with Harkness as surety, for twenty-five hundred dollars, due in eighteen months, in full settlement," and the telegram is erroneously transmitted to read thus: "Have secured twelve hundred dollars mortgage on fifteen hundred dollars and offered note, with Harkness as surety, for twenty-four hundred dollars," et cetera, to which the principal answers: "If twelve hundred mortgage is on fifteen hundred dollars property, accept," the agent is justified in understanding that he is to accept the offer of settlement under the facts as he had stated them, unless the conditions are more favorable to plaintiff than they would be with a twelve hundred mortgage on a fifteen hundred dollar stock, and a settlement based upon and within such an understanding is binding upon the principal. (*Hasbrouck v. Western U. T. Co.*, 181.)

See Brokers; Husband and Wife, 1; Insurance, 15, 16, 20; Limitations of Actions, 2; Telegraph Companies, 8.

ANIMALS.

ANIMALS—KICK FROM A HORSE UPON THE SIDEWALK—OWNER'S LIABILITY.—A person who has been kicked and injured by a horse temporarily standing upon a sidewalk, where it ought not to be, is entitled to recover therefor without proof that the animal was vicious, and that the owner knew it, particularly where the horse was in an exceptionally nervous condition in consequence of the driver's treatment. In such a case, it is, therefore, correct to refuse to direct a verdict for the defendant. (*Hardiman v. Wholley*, 292.)

APPEAL.

1. APPEAL—ERROR FIRST OBJECTED TO ON APPEAL.—It cannot be first objected to on appeal that evidence, properly admissible for a certain purpose, was admitted without instructions limiting its application to such purpose, where no request was made for such instructions. (*Hasbrouck v. Western U. T. Co.*, 181.)

2. APPEAL—EXCEPTION TO PART OF CHARGE.—An exception to part of a charge cannot be made to apply to any other portion than that to which it apparently relates. (*Fall Brook Coal Co. v. Hewson*, 466.)

3. APPEAL—CRIMINAL CASES—IMPROPER APPEAL TO JURY—ILLUSTRATION—REVERSAL OF CONVICTION.—When a city officer is being prosecuted for conniving at the allowance of a

fraudulent claim against the city, and the prosecuting attorney, in summing up, makes harsh and unjust statements to the jury, not founded upon evidence, but resting wholly on his unsupported declarations; draws vivid pictures of suffering and want, of wrongs done to widows and their broods of little children, with "pinched and haggard" faces, by the defendant, and of a multitude of people waiting outside the courthouse for his conviction; deplets the hardships of small taxpayers; urges the privations of the poor and the overwhelming influence of public opinion against the defendant; describes him as a thief, living in a palace on the proceeds of public plunder; and even attempts to intimidate the jury by telling them that they will commit "the unpardonable sin" unless they convict him, there is, in case of conviction, presented a situation in which there should be a reversal, particularly where the record shows that such statements were persisted in after repeated objections, under the claim, sustained by the trial court, that it was right to make them. (*People v. Fielding*, 495.)

4. APPEAL—CRIMINAL CASES—IMPROPER APPEAL TO JURY—REVERSAL OF CONVICTION.—If a conviction in a criminal case follows an improper and dangerous appeal to the prejudice of the jurors, made by the prosecuting attorney, and it is reasonably certain that his course brought about such result, the judgment will be reversed for such error whenever it is raised by a proper exception. (*People v. Fielding*, 495.)

5. APPEAL—DISMISSAL OF COMPLAINT—RIGHTS OF PLAINTIFF.—If the question as to whether a corporation is answerable upon a promissory note, payable to the plaintiff's order, otherwise than as an indorser, is raised by the pleadings and proofs in a suit upon the note, and the complaint is dismissed at the close of the plaintiff's case, and an exception taken, the question as to whether the plaintiff, upon his proofs, was entitled to go to the jury, is open for review on appeal, although it was not urged on the motion to dismiss. (*Withrow v. Slayback*, 507.)

6. APPEAL—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTIONS.—Whether the hypothesis propounded to witnesses include the material facts necessary to the formation of an opinion, or whether facts are assumed which have no existence, rests largely in the knowledge of the trial judge, and his rulings will be held conclusive on appeal unless prejudicial error is affirmatively shown. (*Commonwealth v. Wireback*, 625.)

7. APPEAL—FINDINGS OF JUDGE SITTING AS CHANCELLOR.—Findings of fact made by a judge sitting as chancellor will not be disturbed on appeal except for error which clearly appears. An apparent preponderance of testimony against them is not sufficient to lead to a reversal, where there is testimony which might warrant them. (*Steinmeyer v. Siebert*, 641.)

8. APPEAL—INSUFFICIENT ASSIGNMENT OF ERROR.—An assignment of error alleging error in the admission of evidence will not be considered, where it fails to set forth the evidence. (*Swope v. Donnelly*, 637.)

9. APPEAL—IMMATERIAL ERROR.—On appeal, the court will not review the action of the lower court in admitting evidence as part of the *res gestae*, where the admission or rejection of such evidence would not affect the case or change the result. (*Gann v. Railroad*, 687.)

10. APPEAL—INSTRUCTIONS—FAILURE OF DEFENDANT TO TESTIFY.—It is not error in an action for negligence to instruct the jury that no prejudicial inference could be drawn against de-

fendants from their failure to testify, where it does not appear that such defendants had facts peculiarly within their knowledge and not fully known to other witnesses. (*Weeks v. McNulty*, 693.)

11. **APPEAL—REFUSAL TO PERMIT ANSWER TO QUESTIONS.**—The refusal of the trial court to permit answers to pertinent questions affords no cause for reversal, unless the record shows affirmatively that the answers would have been competent and material evidence. (*Weeks v. McNulty*, 693.)

12. **APPEAL—REVERSAL—ERROR IN GIVING AND REFUSING INSTRUCTIONS.**—Conceding that the trial court erred in giving and refusing certain instructions, there should be no reversal where the appellate court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the action of the court in giving the instructions given, or in refusing those which were rejected. (*Wright v. Independence Nat. Bank*, 889.)

13. **APPEAL—ILLEGALITY OF CONTRACT MAY BE FIRST RAISED ON.**—A suit in equity cannot be maintained upon an illegal contract, although the defense of illegality was not raised by the pleadings, or relied upon in the trial court. It may be made for the first time on the argument in the appellate court. (*Camp v. Bruce*, 873.)

14. **APPEAL—WHAT CANNOT BE FIRST ASSERTED ON—SUBROGATION.**—A claim for affirmative relief, such as one to be subrogated to the rights of a lien creditor, not made in the court below, cannot be asserted for the first time in the appellate court. (*New South B. & L. Assn. v. Reed*, 858.)

15. **APPEAL—OBJECTION TO BILL OF EXCEPTIONS.**—The objection that a bill of exceptions was not properly settled, not having been raised in the appellate court before the hearing on the merits, cannot be raised later. (*Hoff v. Olson*, 903.)

16. **APPEAL—ERROR—REVOKING ORDER OF NONSUIT.**—It is not error for a court to withdraw its order of nonsuit and direct a verdict instead, in an action for negligence, where no change in the situation of parties has intervened and the jury has not been discharged. (*Portance v. Lehigh Val. Coal Co.*, 932.)

See Attachment, 12; Homicide, 6; Instructions; Libel, 2.

ASSAULT.

ASSAULT—BATTERY UPON PERSON OF UNSTABLE NERVES—DAMAGES.—If a street-car conductor commits an unjustifiable battery upon the person of a lady passenger, who has unstable nerves, the company must answer for the actual consequences of the wrong to her as she is, and the damages cannot be cut down by showing that the effect would have been less upon a normal person. (*Spade v. Lynn etc. R. R. Co.*, 298.)

See Husband and Wife, 1.

ASSIGNMENT.

See Corporations, 21, 24; Guaranty, 1, 3; Insurance, 8-10, 22, 23; Mortgages, 9-11.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Attachment, 1; Dower, 2.

ASSOCIATIONS.

1. ASSOCIATIONS—BENEFIT SOCIETIES.—THE CONSTITUTION OF A BENEFIT SOCIETY, if no part of its charter, has only the effect of a by-law, and cannot take from the rightfully constituted authorities of the society their inherent power to adopt, from time to time, such other by-laws as its charter permits or necessity requires. (Supreme Lodge K. of P. v. Kutscher, 115.)

2. ASSOCIATIONS—BENEFIT SOCIETIES—EFFECT OF BY-LAW.—A by-law of a benefit society forfeiting claims of a member for suicide is binding on one who joins the society before its passage, and whose contract requires compliance with the by-laws in force or "hereinafter enacted." (Supreme Lodge K. of P. v. Kutscher, 115.)

3. ASSOCIATIONS—BENEFIT SOCIETIES—DELEGATION OF POWER.—The supreme lodge of a benefit society cannot delegate to a subordinate lodge the power to enact a by-law forfeiting the certificate of membership and all claims thereunder of any member whose death results from self-destruction, voluntary or involuntary, whether sane or insane. (Supreme Lodge K. of P. v. Kutscher, 115.)

4. ASSOCIATIONS—BENEFIT SOCIETIES—CONSTRUCTION OF CERTIFICATE.—A certificate of membership in a benefit society which binds the member to comply with all the laws governing the endowment rank which are in force when he becomes a member, or which may thereafter be enacted by the supreme lodge or the board of control, binds him to comply with such laws only as such board or the supreme lodge may lawfully enact and adopt. (Supreme Lodge K. of P. v. Kutscher, 115.)

5. ASSOCIATION—BENEFIT SOCIETY—ADOPTION OF BY-LAW.—The adoption by the supreme lodge of a benefit society of an unauthorized by-law passed by a subordinate lodge renders such by-law effective, and binds members of such subordinate lodge who have agreed to comply with the by-laws now "in force or that may be hereafter enacted by the supreme lodge." Supreme Lodge K. of P. v. Kutscher, 115.)

6. ASSOCIATIONS—BENEFIT SOCIETIES—ENACTMENT OF BY-LAWS.—The adoption by the supreme lodge of a benefit society, by a viva voce vote, of a by-law passed by a subordinate lodge or board of control without authority, is a valid enactment of such law, although the constitution of such supreme lodge provides another method of enacting by-laws. The by-law thus enacted binds members whose contracts require compliance with all by-laws "now in force or hereafter enacted by such supreme lodge." (Supreme Lodge K. of P. v. Trebbe, 120.)

7. ASSOCIATIONS—BY-LAWS.—THE CONSTITUTION OF A VOLUNTARY ASSOCIATION is nothing more than a by-law which may be altered, abrogated, or repealed by the power enacting it, unless some higher rule restrains or prohibits a change or repeal. (Supreme Lodge K. of P. v. Trebbe, 120.)

8. ASSOCIATIONS—BY-LAWS—REPEAL.—The valid passage of a by-law by the supreme lodge of a benefit society in any mode not prohibited by its charter or general law is necessarily a repeal of any other mode previously prescribed by the same supreme lodge. (Supreme Lodge K. of P. v. Trebbe, 120.)

9. ASSOCIATIONS—BENEFIT SOCIETIES—AMENDMENT OF BY-LAWS APPLIES TO WHAT MEMBERS.—If a by-law of an incorporated beneficiary association, which allows every member

a right to five dollars a week if he becomes disabled during a period of not exceeding thirteen weeks in each year, is amended so as to limit his benefits to one dollar per week, for thirteen weeks of each year, during a period of five years, after he has received thirty-nine weeks of sick benefits, such amendment applies to a member who, at the time of its adoption, was under a disability, and had been paid benefits for thirty-nine weeks. (*Pain v. Societe St. Jean Baptiste*, 287.)

10. ASSOCIATIONS — BENEFIT SOCIETIES — POWER TO AMEND BY-LAWS.—An incorporated beneficiary association has power to so amend its by-laws as to deprive a member of his right to future benefits, under a disability existing at the time of the amendment, where it has, without limitation or restriction, reserved the power to amend its by-laws. (*Pain v. Societe St. Jean Baptiste*, 287.)

See Social Clubs.

ATTACHMENT.

1. ATTACHMENT — TRUSTEE PROCESS — PROPERTY IN HANDS OF ASSIGNEE FOR BENEFIT OF CREDITORS.—If a debtor conveys machinery, supplies, and stock on hand in a shoe factory, and book accounts, to an assignee in trust for the benefit of creditors, and creditors do not become parties to the deed, the property, in the hands of the assignee, is subject to trustee process, though nothing has been done about taking possession of it, for the title has passed, as between the parties to the deed, and the assignee or trustee has the immediate right of possession. (*Avery v. Monroe*, 250.)

2. ATTACHMENT—FALSEAFFIDAVIT.—An attachment based on a false affidavit of the nonresidence of the debtor is void. (*German Nat. Bank v. Kautter*, 371.)

3. ATTACHMENT—JUDGMENT BY CONSTRUCTIVE SERVICE—ATTACK UPON.—If plaintiff in attachment seizes a resident's property as that of a nonresident, and sells it under a judgment rendered upon constructive service, the judgment defendant may, in the absence of an appearance in that suit, attack such judgment in subsequent suit by him, wherein the attachment plaintiff invokes such judgment as a defense, and show that it is void for the reason that at the time of the inception of the attachment suit and judgment he was a resident of the state and then therein. This may be done although the record in the attachment suit is regular on its face. (*German Nat. Bank v. Kautter*, 371.)

4. ATTACHMENT SALES—TITLE OF PURCHASER—COLLATERAL ATTACK.—A purchaser at execution sale of the real property of a nonresident defendant taken under attachment acquires a title not subject to collateral attack in another action, although the publication of notice preceding the judgment in the attachment proceeding was irregular and might have been attacked therein. (*Brown v. Bose*, 379.)

5. ATTACHMENT — WHEN NONRESIDENT MAY BE CHARGED AS GARNISHEE—JURISDICTION.—The courts of a state can charge a nonresident debtor, transiently within their jurisdiction, as garnishee, if he has in his possession money or property of the defendant, or if he has contracted to pay money or deliver property within such jurisdiction. (*Balk v. Harris*, 606.)

6. ATTACHMENT — GARNISHMENT — JURISDICTION. — A court entertaining a garnishment must have some jurisdiction over

the thing garnished, and, where the garnishee is a nonresident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within that state, the jurisdiction is defeated. (*Balk v. Harris*, 606.)

7. ATTACHMENT—NONRESIDENT GARNISHEE—JURISDICTION.—As a general rule, the courts of a state cannot, by their service of process upon an inhabitant of another state transiently within their jurisdiction, charge such person as garnishee. (*Balk v. Harris*, 606.)

8. ATTACHMENT—GARNISHMENT—JURISDICTION OF ACTION.—Since an attachment is in effect a proceeding by the principal debtor in the name of the plaintiff against the garnishee, the action must be brought where the garnishee resides, for it is there that his creditor must have sued him. (*Balk v. Harris*, 606.)

9. ATTACHMENT—GARNISHMENT—SITUS OF DEBT.—In North Carolina, the situs of a debt for purposes of an attachment is where the debtor resides. (*Balk v. Harris*, 606.)

10. ATTACHMENT—SERVICE OF GARNISHMENT—EFFECT OF.—The service of garnishee process operates as an equitable levy upon property belonging to the principal defendant in the hands of the garnishee, which levy may be enforced against such property in the hands of any other than an innocent purchaser for value, unless such right of enforcement be waived. (*Maxwell v. Bank*, 926.)

11. ATTACHMENT—GARNISHMENT—ELECTION OF REMEDIES.—Where a plaintiff in a suit of garnishment, in which process has been served on the garnishee, having the right to prevent the garnishee from disposing of the property for which he may be liable, elects to consider the garnishee his debtor and take personal judgment against him, he will be held to his election, and cannot follow the property or its proceeds. (*Maxwell v. Bank*, 926.)

12. ATTACHMENT—GARNISHMENT—EFFECT OF APPEAL WITHOUT STAY.—A plaintiff in garnishment having elected to sue the garnishee personally, and judgment being rendered for the garnishee, an appeal from such judgment does not operate as a supersedeas, or restrain in any way the conduct of the garnishee concerning the property of the principal defendant in his hands. To preserve his equitable lien upon such property plaintiff must have it continued by special order of court, and, such continuance not being had, such lien is not revived by a reversal of the judgment appealed from. Persons taking the property from the garnishee pending the appeal take it free from such equitable lien. (*Maxwell v. Bank*, 926.)

See Insolvency, 3.

AWARD.

See Eminent Domain, 1, 5.

BAIL.

1. BAIL IN CAPITAL CASE—BURDEN OF PROOF.—On an application by habeas corpus for bail in a capital case, the burden to establish the fact that the proof is evident is upon the state and not upon the relator, to prove the contrary. (*Ex parte Newman*, 740.)

2. BAIL—ACCUSED, WHEN ENTITLED TO.—Unless the case is a capital one and the proof is evident of this fact, and unless the proof is evident that the prisoner is guilty of a capital crime, he

is entitled to bail, and the burden of proof is on the prosecution to show that he is not so entitled. (Ex parte Newman, 740.)

BANKRUPTCY.

BANKRUPTCY—EFFECT OF FEDERAL STATUTE UPON STATE INSOLVENCY PROCEEDINGS.—The United States bankruptcy law of July 1, 1898, supersedes all state laws in regard to insolvency from the date of the passage of the statute. Hence insolvency proceedings commenced in the state courts after the passage of that law are unauthorized. (Parmenter Mfg. Co. v. Hamilton, 258.)

BANKS AND BANKING.

1. BANKS AND BANKING—SELECTION OF NOTARY—POWERS OF NOTARIES.—In Iowa, giving notice to indorsers of a protested instrument is made a part of the official duty of the notary making the protest, and a collecting bank acts prudently in intrusting to a notary the giving of such notice. (First Nat. Bank v. German Bank, 216.)

2. BANKS AND BANKING—SELECTION OF NOTARY—LIABILITY FOR HIS NEGLIGENCE.—A bank to which a draft is sent by another bank for collection is not liable to the latter for the negligence of a notary public prudently selected by the former to protest the draft for nonpayment, which negligence consisted in the failure of the notary to ascertain the residence of the person who indorsed the draft to the sender bank, or to notify him of the dishonor of the draft. This rule is not changed by the fact that the notary was also assistant cashier of the collecting bank. (First Nat. Bank v. German Bank, 216.)

3. BANKS AND BANKING—COLLECTIONS—NEGLIGENCE OF NOTARY.—Where one bank makes another bank its agent for the collection of a draft, it impliedly authorizes it to employ a notary, if necessary, to protest the draft, and if, through the notary's negligence, collection of the draft is prevented, in the absence of reasonable prudence on the part of the collecting bank in the selection of a notary, such collecting bank is not liable for the notary's negligence, but the sender bank must seek its remedy against the notary. (First Nat. Bank v. German Bank, 216.)

BATTERY.

See Assault.

BENEFIT SOCIETIES.

See Associations.

BONDS.

BONDS—COUPONS OR INTEREST—NATURE.—Coupons attached to bonds, being for interest to become due on such bonds, are a part of them and partake of their nature. (Broadfoot v. Fayetteville, 610.)

See Fraud; Limitations of Actions, 8; Municipal Corporation, 14, 15; Sureties, 1.

BRIBERY.

See Municipal Corporations, 7.

BROKERS.

BROKERS—SALES IN BROKER'S NAME—LIABILITY OF PRINCIPAL.—Where an agreement between a broker and his principal for the sale of fruit does not authorize the former to make contracts of sale in his own name, but makes him a mere agent to sell on commission, the principal is not liable to him for losses sustained by reason of the principal's refusal to ship fruit to fill such contracts, because of which refusal the broker purchased fruit at excessive market rates to fill the contracts; but if the principal approved such contracts he is liable to the broker for commissions thereon. (*Delafield v. Smith*, 938.)

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—USURY—PREMIUMS.—A statute authorizing building and loan associations to collect premiums from borrowing members for the right of precedence in taking loans, and that these premiums so paid, taken with the legal rate of interest, shall not be construed as making the loans usurious, contemplates good-faith bidding of premiums for the right of precedence. Where the monthly payments of premiums and interest together exceed the legal rate of interest, and payments made by a member are designated as premiums merely as a device to evade the law against usury instead of being paid in good faith to secure a loan, the loan is usurious. (*Wilcoxon v. Smith*, 220.)

2. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF BORROWING AND NONBORROWING MEMBERS. In case of the insolvency of a building and loan association, and a liquidation of its affairs, there should be an equitable distribution of its assets less its liabilities. Borrowing members are only entitled to be credited with the actual value of their shares, although by the by-laws of the association and under the terms of their loans they are entitled to the book, or withdrawal, value of such shares. Such provisions in the by-laws and terms of the loans contemplate a going concern, and do not apply when the association has become insolvent and is in the process of final liquidation. (*Wilcoxon v. Smith*, 220.)

3. BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF MEMBERS—PLEDGING STOCK AS SECURITY FOR LOAN. Where the articles of incorporation and by-laws of a building and loan association provide for loans to shareholders on the security of their shares of stock, shareholders do not cease to be members of the association by pledging their shares for loans. (*Wilcoxon v. Smith*, 220.)

4. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF BORROWING MEMBERS—CREDIT FOR VALUE OF SHARES.—Where a building and loan association is insolvent, and its affairs are in process of liquidation, it will be presumed, in the absence of proof, that borrowing members are entitled to have credited upon their debts to the association the book value of their shares. The burden of proof is upon one who would rebut this presumption to show the actual value of such shares. (*Wilcoxon v. Smith*, 220.)

5. BUILDING AND LOAN ASSOCIATIONS—USURIOUS INTEREST AND PREMIUMS—APPLICATION TO MEMBER'S CREDIT.—Usurious interest and premiums paid to a building and loan association by a borrowing member should be applied to the credit of such member as deductions from the amount of his loan. (*Wilcoxon v. Smith*, 220.)

6. BUILDING AND LOAN ASSOCIATIONS—AMOUNT RECOVERABLE FROM MEMBERS—STATUTORY CONSTRUCTION.—A statute fixing the amounts that may be included in the recovery by a building and loan association from a borrower should be construed as fixing the maximum amount of recovery, and not as preventing the association from contracting to receive a less amount. (*Iowa Sav. & Loan Assn. v. Heidt*, 197.)

7. BUILDING AND LOAN ASSOCIATIONS—USURY—EXACTION OF PREMIUMS.—A building and loan association authorized by statute to receive "premiums bid by members for the right of precedence in taking loans," has no authority to exact from the borrower, where there is no competition, an arbitrary sum in addition to the interest on his loan, where the whole amounts to more than legal interest. (*Iowa Sav. & Loan Assn. v. Heidt*, 197.)

8. BUILDING AND LOAN ASSOCIATIONS—USURY—INTEREST UPON FACE, RATHER THAN AMOUNT, OF LOAN.—A building and loan association, having deducted from a loan to a member a sum sufficient to pay expenses incidental to making the loan, which are properly charged to the borrower, may compute legal interest upon the face of the loan instead of the amount actually received by the borrower without making the transaction usurious. (*Iowa Sav. & Loan Assn. v. Heidt*, 197.)

9. BUILDING AND LOAN ASSOCIATIONS—EXORBITANT FINES.—One who purchases stock in a building and loan association is held to a knowledge of the terms of his membership, and will not be heard later to complain of the imposition of reasonable fines for defaults in payments, which fines are authorized by statute. (*Iowa Sav. & Loan Assn. v. Heidt*, 197.)

10. BUILDING AND LOAN ASSOCIATIONS—LOANS TO MEMBERS—PROPER DEDUCTIONS.—A building and loan association may retain from loans made to members a sum sufficient to cover the cost of examining abstract, appraiser's fee, recording mortgage, and expenses of management. (*Iowa Sav. & Loan Assn. v. Heidt*, 197.)

11. USURY—STATUTORY CHANGES—RETROACTIVE EFFECT.—The privilege of pleading usury pertains only to the remedy and may be taken away by statute as to contracts entered into before the enactment of the statute, nor does such a statute impair vested rights when enacted pending an appeal from a decree in favor of a member of a building and loan association on a plea of usury, made to avoid the enforcement of a contract between himself and the association. (*Iowa Sav. & Loan Assn. v. Heidt*, 197.)

12. BUILDING AND LOAN ASSOCIATIONS—USURY—CONSTITUTIONAL LAW.—The legislature may exempt transactions between building and loan associations and their members from the operation of the law against usury. (*Iowa Sav. & Loan Assn. v. Heidt*, 197.)

BURDEN OF PROOF.

BURDEN OF PROOF—PRESUMPTION.—Where a railroad commission has taken any action under a statute, every presumption is in favor of the action, and the burden is upon the party complaining to show that such action was contrary to law. (*Jacobson v. Wisconsin etc. R. R. Co.*, 358.)

See *Ball*, 1; *Habeas Corpus*, 4; *Interstate Commerce*, 5; *Liens*, 4; *Telegraph Companies*, 4; *Vendor and Purchaser*, 2, 3.

CARRIERS.

1. A COMMON CARRIER IS ONE WHO, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and everyone who undertakes to carry for compensation the goods of all persons indifferently is, as to liability, to be deemed a common carrier. (Jacobson etc. Works v. Hurlbut, 432.)

2. CARRIERS, COMMON—WHO ARE.—Truckmen, wagoners, cartmen, and porters who undertake to carry goods for hire as a common employment in a city, or from one town to another, are common carriers, although carrying is not the exclusive business of the parties. (Jackson etc. Works v. Hurlbut, 432.)

3. CARRIERS, COMMON—TRUCKMEN, WHO MOVE HEAVY MACHINERY.—If persons advertise themselves as general truckmen, their particular specialty being the moving of heavy machinery, and they keep and maintain for this purpose a large number of trucks and horses, and the necessary help for the prosecution of the business, there is, in an action against them for damages caused by injury to such machinery, during its transportation, no error in the refusal of the trial judge to instruct the jury that the defendants are not common carriers. The circumstance that the defendants have no regular tariff of charges for their work, but that a special price is fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed and commensurate with the carrier's responsibility as such. (Jackson etc. Works v. Hurlbut, 432.)

See Negligence, 2.

CAVEAT EMPTOR.

See Execution, 1.

CEMETERIES.

1. CEMETERIES—BURIAL RIGHTS—LICENSE TO USE GROUND.—One who enters into possession of a lot in a public cemetery, improves the same, and uses it for burial purposes, with the express or implied consent of those who have control of the cemetery, although he acquires no title to the lot, acquires a license to use the same for burial purposes, which license, so long as it continues, will support an action of trespass for any invasion or disturbance of it, whether by the grantors or strangers. (Hollman v. Platteville, 899.)

2. CEMETERIES—REGULATION BY CITY—LIABILITY OF CITY IN DAMAGES.—A city given power, by statute, to adopt regulations as to a public cemetery, and, upon proper notice, to compel lotowners or occupants to comply with such regulations, is liable in damages to a lot occupant, if, without having adopted any regulations, and without notice to him, it invades his lot and cuts down trees which he has planted therein in the improvement thereof, (Hollman v. Platteville, 899.)

CHARITABLE TRUST.

See Wills, 8, 9, 10.

COLLATERAL ATTACK.

See Adoption, 3; Attachment, 4; Judgment, 10, 18.

CONDITIONS.

See Devise, 2, 7-9.

CONFESSIONS.

See Criminal Law, 12-14.

CONFLICT OF LAWS.

See Bankruptcy.

CONSIDERATION.

See Deeds, 2, 3; Husband and Wife, 4; Municipal Corporations, 20.

CONSTITUTIONS.

CONSTITUTIONAL LAW — LOCAL OPTION.—A constitutional provision giving the legislature authority to enact laws with regard to the adoption of local option by the people is exclusive of any other method to be pursued by the legislature for dealing with the question, especially so far as the same territory is concerned where local option has been adopted. (*Ex parte Brown*, 743.)

See Mandamus, 1.

CONTEMPT.

1. CONTEMPT—INSTITUTION OF PROCEEDINGS FOR, BY COURT—NEWSPAPER PUBLICATIONS.—When it comes, in any manner, to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held, which are calculated to prevent a fair trial of a cause then on trial before the court, the court, of its own motion, can institute proceedings for contempt. (*Telegram etc. Co. v. Commonwealth*, 280.)

2. CONTEMPT—CORPORATION — FINE — EXECUTION.—The proper method of collecting a fine imposed upon a corporation for a contempt of court is by a levy of an execution issued by the court. (*Telegram etc. Co. v. Commonwealth*, 280.)

3. CONTEMPT—CORPORATION—LIABILITY.—An intent may be imputed to a corporation in criminal proceedings, and it may, therefore, be held answerable for a criminal contempt of court. (*Telegram etc. Co. v. Commonwealth*, 280.)

4. CONTEMPT—CORPORATION — NEWSPAPER PUBLICATION OF FACTS.—It is a contempt of court for a newspaper, printed by a corporation and circulated in the place where a trial is had, pending the trial, to publish statements of facts, evidence of which is not competent at the trial, and which is not introduced thereon, if they are so made that it is likely that the presiding justice and the jurors will read them during the trial, and their natural and probable effect will be to improperly influence the justice and the jury in the determination of the cause. (*Telegram etc. Co. v. Commonwealth*, 280.)

5. CONTEMPT — CORPORATION — NEWSPAPER PUBLICATION.—The publication of an article in a newspaper, printed by a corporation and circulated in the place where a trial is had, pending the trial, which concerns the cause on trial, and which is calculated to prejudice the jury in the cause, and prevent a fair trial, is a criminal contempt of the court trying the cause, for which the corporation may be held answerable. (*Telegram etc. Co. v. Commonwealth*, 280.)

CONTRACTS.

1. **CONTRACT FOR BENEFIT OF THIRD PARTY—RIGHT OF ACTION FOR BREACH.**—The beneficiaries of a contract, who furnish the consideration money of the contract, can maintain an action for damages caused by its breach. (*Gorrill v. Water Supply Co.*, 598.)

2. **CONTRACT FOR BENEFIT OF THIRD PARTY—RIGHT OF ACTION.**—One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. (*Gorrill v. Water Supply Co.*, 598.)

3. **CONTRACT FOR BENEFIT OF THIRD PARTY—BENEFICIARY ONE OF A CLASS—ACTION.**—One not a party to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach, even when he is only one of a class of persons, if the class is sufficiently designated. (*Gorrill v. Water Supply Co.*, 598.)

4. **CONTRACTS—CONSTRUCTION OF PROMISES.**—It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. (*Kendrick v. Life Ins. Co.*, 592.)

5. **CONTRACTS—CONSTRUCTION OF.**—If it be left in doubt whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee. (*Kendrick v. Life Ins. Co.*, 592.)

6. **CONTRACTS—DISCHARGE OF FIRST INDORSER BY AGREEMENT FOR INDULGENCE—PARTIES.**—An agreement for indulgence which will discharge or release the first indorser on a promissory note cannot be made with any other person than the maker of the note, or principal debtor. (*Wright v. Independence Nat. Bank*, 889.)

7. **CONTRACTS—EXTENDING TIME TO SECOND INDORSER FOR PAYMENT OF NOTE DOES NOT DISCHARGE FIRST INDORSER OR SURETY.**—An agreement between the holder of a negotiable note and a second indorser upon it, to extend the time of payment, does not discharge the first, though an accommodation indorser from his liability on the note, and furnishes no defense to an action brought against him by the holder, as the agreement does not prevent the first indorser from paying the debt, and proceeding at once against the maker, or from exercising any rights which a surety may assert for his protection against his principal. (*Wright v. Independence Nat. Bank*, 889.)

8. **CONTRACTS—ILLEGALITY—WAIVER—FAILURE TO PLEAD.**—The illegality of a contract cannot be gotten rid of either by a failure to plead it, or by agreeing to waive it in the most solemn manner. (*Camp v. Bruce*, 873.)

9. **CONTRACTS—ILLEGALITY OF, IS FATAL.**—The law refuses to enforce illegal contracts from reasons of public policy, and it is immaterial at what stage of the case the illegality appears. (*Camp v. Bruce*, 873.)

10. **CONTRACTS OPPOSED TO PUBLIC POLICY—JUDICIAL SALES—BUYING BIDS.**—The object in judicial sales is to get the best price that can be fairly had for the property. Hence, to allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price, is condemned by the law, and the courts will not enforce contracts founded in such practices. (*Camp v. Bruce*, 873.)

11. **CONTRACTS OPPOSED TO PUBLIC POLICY—JUDICIAL SALES—BUYING BID BEFORE CONFIRMATION.**—An agreement between the purchaser at a judicial sale and another person that the former will, upon a confirmation of the sale, sell the property to the latter at an advanced price is contrary to public policy and void, because it tends to prevent the property from bringing the best price. (*Camp v. Bruce*, 873.)

12. **CONTRACTS PROCURED BY FRAUD—AFFIRMANCE—RESCISSION—NEW INCIDENTS OF SAME FRAUD.**—If a contract has been procured by fraud, and the person defrauded, with knowledge of the substance of the fraud, elects to affirm the contract, he cannot subsequently, upon discovering new incidents of the same fraud, elect to rescind the contract. Knowledge of the essence of the fraud puts him to his election. The subsequent discovery of a new incident in the fraud does not confer a new right to rescind, but merely confirms the previous knowledge of the same fraud. (*Wilson v. Hundley*, 837.)

13. **CONTRACTS PROCURED BY FRAUD—RESCISSION OR AFFIRMANCE—ELECTION.**—If a party who has been defrauded in the procurement of a contract elects, on discovery of the fraud, to affirm the contract, his election is final and conclusive. He has but on election to rescind, and, having once elected to affirm the contract, he cannot thereafter disaffirm it, but must abide by the decision he has made. (*Wilson v. Hundley*, 837.)

14. **CONTRACTS PROCURED BY FRAUD—RIGHTS AND REMEDIES OF PARTY DEFRAUDED.**—A contract induced by fraud is not void, but voidable at the option of the party injured by the fraud. Upon its discovery he has, as a general rule, the choice of two remedies: 1. He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given; or, if he has not paid or given anything, repudiate the contract, and rely, when sued, upon the fraud as a complete defense; 2. He may elect to retain what he has received under the contract, and bring an action to recover damages for the injury he has sustained from the deceit. By adopting the latter course, he, in effect, affirms the contract, but not as made in good faith. He consents to be bound by its provisions, but does not thereby release or waive his claim for damages arising from the fraud collateral to the agreement. (*Wilson v. Hundley*, 837.)

See Appeal, 13; Corporations, 4, 5, 7, 8; Executors and Administrators; Guardian and Ward, 2, 4, 5; Insurance, 13, 14; Municipal Corporations, 3-10; Names; Statute of Frauds, 1; Waterworks and Water Companies, 1.

CORPORATIONS.

1. **A CORPORATION HAS ITS DOMICILE** in the jurisdiction of the state which created it, and, as a consequence, has no domicile anywhere else. (*Bergner etc. Brewing Co. v. Dreyfus*, 251.)

2. **CORPORATIONS—ACTION BY A FOREIGN CORPORATION—DISCHARGE OF INSOLVENT AS A BAR.**—A discharge under the insolvency laws of Massachusetts does not discharge a debt due from the Massachusetts debtor to a corporation of another state, having its principal place of business in the latter state, although it has a place of business in Massachusetts, and a license under the laws of that state, and has complied with its laws regulating foreign corporations doing business there, respecting the appointment of a person upon whom process may be served. (*Bergner etc. Brewing Co. v. Dreyfus*, 251.)

3. CORPORATIONS — STOCKHOLDERS — LIABILITY TO CREDITORS—TRANSITORY ACTION.—The liability of a stockholder in a corporation organized under the laws of the state of Kansas for the debts of the corporation is several, and may be enforced by an action against him in any court of general jurisdiction in the state where personal service of process can be made upon the stockholder. (*Hancock Nat. Bank v. Ellis*, 232.)

4. CORPORATIONS—CONTRACT FOR STOCK SUBSCRIPTION—CONSTRUCTION.—A contract made to induce stock subscriptions, whereby the promisors agree to repurchase the stock at the end of three years, upon receiving thirty days' notice that the subscriber desires to return the stock, is conditional, and liability thereunder does not exist in favor of a particular promisee, unless, within a reasonable time after the expiration of the three years, the thirty days' notice is given by him to the promisors of his election to carry the stock no longer. (*Rogers v. Burr*, 50.)

5. CORPORATIONS—STOCK SUBSCRIPTIONS—CONTRACT OF GUARANTY—CONSTRUCTION.—If joint promisors, to induce stock subscriptions, guarantee the payment of eight per cent dividends to subscribers for three years, and, at the expiration of that time, on receiving a specified notice, to purchase the stock at its par value, the guaranty as to the dividends is unconditional and binding without notice, and covers a period of three years, although the guaranty as to purchasing the stock becomes inoperative for want of notice. (*Rogers v. Burr*, 50.)

6. CORPORATIONS—STOCK SUBSCRIPTIONS — STATUTE OF FRAUDS.—It is not necessary to the validity of a contract of subscription to shares of stock in a manufacturing corporation that it be reduced to writing. Shares of stock in joint stock companies are not within the statute of frauds. (*Rogers v. Burr*, 50.)

7. CORPORATIONS—STOCK SUBSCRIPTIONS — VALIDITY OF GUARANTY—CONSIDERATION.—If a number of persons, in order to induce another to subscribe to the capital stock of a manufacturing corporation in which they are all interested, execute a joint agreement guaranteeing the payment of an annual dividend of eight per cent for three years on such stock to subscribers who take enough stock for the successful organization of the corporation, and also agreeing that if, at the expiration of such three years, the holders of such stock do not desire to carry it any longer, "we hereby agree, with thirty days' notice from any or all of them, to pay each holder par value, or fifty dollars, for each share of stock held by them, their heirs or assigns," such agreement of guaranty is valid and based upon a sufficient consideration, where the guarantors are residents of the town in which the manufacturing corporation is to be located, are interested in its growth and development, and jointly interested with the subscribers in the furtherance of the undertaking. (*Rogers v. Burr*, 50.)

8. CORPORATIONS—STOCK SUBSCRIPTIONS—CONSTRUCTION OF CONTRACT.—If several persons, in order to induce a promisee to subscribe for stock, jointly agree to buy such stock back at the end of three years, upon receiving a specified notice from the promisee of his election to sell, notice to one or more joint promisors of an election by the promisee to sell his stock is not notice to the others, and this, though one of them, as agent for the others, has procured stock subscriptions under the contract. (*Rogers v. Burr*, 50.)

9. CORPORATIONS—LIABILITY OF STOCKHOLDERS—COUNTERCLAIM.—In an action by a stockholder of an insolvent corporation to enjoin an execution sale of real estate which has

been purchased by him from the members of a firm against whom the defendant has recovered the judgment on which the execution issued, an answer charging that all the stockholders of such corporation are liable for the payment of the debt on which the judgment is based and asking that they be brought in and required to pay does not set up a counterclaim. (Wehn v. Fall, 397.)

10. CORPORATIONS—INSOLVENCY—RIGHTS OF CREDITORS—LIABILITY OF STOCKHOLDERS.—A creditor of an insolvent and dissolved corporation must first exhaust his legal remedy against it, before he can sue to obtain satisfaction of his claim against a stockholder who has come into possession of corporate assets. (Wehn v. Fall, 397.)

11. CORPORATIONS—INSOLVENCY—LIEN OF CREDITOR ON ASSETS.—A creditor of an insolvent corporation does not acquire any specific lien on its assets, and cannot proceed against one having possession of such assets without first reducing his claim to judgment. (Wehn v. Fall, 397.)

12. CORPORATIONS—INSOLVENCY.—CREDITORS of an insolvent corporation must first obtain judgment on their claims before attempting to reach property transferred by the corporation in fraud of their rights. (Wehn v. Fall, 397.)

13. CORPORATIONS—BUSINESS NOT AUTHORIZED BY ARTICLES OF INCORPORATION—LIABILITY OF STOCKHOLDERS.—The mere fact that a corporation has done some business outside that authorized by its articles does not render the stockholders, as such, liable for its corporate debts, to the amount of stock owned or held by them, although the stockholders would be so liable, under the state constitution, if such business had been authorized by its articles. (Nicollet Nat. Bank v. Frisk-Turner Co., 334.)

14. CORPORATIONS, CHARACTER OF — HOW DETERMINED.—At least in the absence of a fraudulent attempt to evade the law, the articles of incorporation are themselves the sole criterion to ascertain the purpose for which the corporation was formed. (Nicollet Nat. Bank v. Frisk-Turner Co., 334.)

15. CORPORATIONS—POWERS—DUTIES OF THIRD PERSONS.—Strangers or third persons are presumed to know the law of the land, and are bound, when dealing with corporations, to know the powers conferred by their charters. (Nicollet Nat. Bank v. Frisk-Turner Co., 334.)

16. CORPORATIONS, MANUFACTURING—WHEN ARTICLES OF INCORPORATION DO NOT AUTHORIZE THE CONDUCTING OF A MERCANTILE BUSINESS.—The buying and selling of ready-made clothing is purely a mercantile business, and is unauthorized by the articles of incorporation of a manufacturing corporation permitting "the transaction of all business necessary and incidental to such manufacture and sale of clothing." (Nicollet Nat. Bank v. Frisk-Turner Co., 334.)

17. CORPORATIONS—CONSTRUCTION OF ARTICLES OF INCORPORATIONS—MANUFACTURING.—A corporation, whose articles of incorporation state that "its business shall be the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing," is a manufacturing corporation within the meaning of article 10, section 3, of the Minnesota constitution. (Nicollet Nat. Bank v. Frisk-Turner Co., 334.)

18. CORPORATIONS — DEFINITIONS. — "AN INCIDENTAL POWER is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it." (*Nicollet Nat. Bank v. Frisk-Turner Co.*, 334.)

19. CORPORATIONS — POWERS. — A corporation possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. (*Nicollet Nat. Bank v. Frisk-Turner Co.*, 334.)

20. CORPORATIONS — NOTICE — KNOWLEDGE OF PRESIDENT. — A corporation cannot be charged with the knowledge of its president, when such knowledge was obtained before he became president, or when he is acting in his own interest and behalf. (*Dorr v. Life Ins. Co.*, 308.)

21. CORPORATIONS — ASSIGNMENT OF STOCK — EFFECT ON LIEN OF THE CORPORATION. — An assignment or sale of corporation stock, to a person ignorant of a statutory lien thereon held by the corporation, will not discharge the lien. (*Dorr v. Life Ins. Co.*, 309.)

22. CORPORATIONS — STATUTORY LIEN ON STOCK. — When, by general law, a lien is given to a corporation upon the stock of a stockholder in the corporation for his indebtedness to it, that lien is valid and enforceable against all the world, unless it has been waived, surrendered, or lost in some sufficient manner. (*Dorr v. Life Ins. Co.*, 308.)

23. CORPORATIONS — TRUST COMPANY — PRESUMPTION OF CAPACITY. — In the absence of specific restriction in its charter, a trust company having general power to "execute trusts of every description" must be presumed to have corporate capacity to act as committee of a lunatic. (*Equitable Trust Co. v. Garis*, 644.)

24. CORPORATIONS — STOCKHOLDER'S LIABILITY — ENFORCEMENT OF IN ANOTHER STATE. — An assignee of an insolvent corporation of another state, appointed therein and authorized by the law thereof to maintain any suit which the corporation could have maintained, may maintain an action in another state against all the original stockholders residing therein to enforce their common-law contractual liability to pay the subscription price of their stock and to compel them to contribute their pro rata share of the indebtedness of the corporation to the extent of their unpaid stock subscriptions. This remedy exists independently of the provisions of the statute of the former state. (*Stoddard v. Lum*, 541.)

25. CORPORATIONS — STATUTORY ACTION TO RECOVER DEBT OF DIRECTORS WHERE COMPANY FAILS TO FILE AN ANNUAL REPORT. — In a suit wherein it is sought to charge the defendants, as directors of a corporation, by virtue of the provisions of a statute, which provides that, in case of failure to file an annual report, "all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made," the plaintiff must, in order to succeed, prove either that, at the time of default in filing the annual report, the debt in suit existed, or that it was contracted before the report was filed. (*Withrow v. Slayback*, 507.)

26. CORPORATIONS — FAILURE TO FILE ANNUAL REPORT — ACTION FOR DEBT — ABANDONMENT OF BUSINESS AS A DEFENSE. — If a statute makes the directors of a corporation answerable for its existing debts, and those contracted before the company makes an annual report, it is no defense to an action brought to charge them with corporate debts by virtue of the company's

failure to file a report that the company had ceased to exist, by abandoning its business and turning over its property to its creditors, before the time for filing the report, if it is shown that such transfer did not embrace all of its property, and that the company continued to exercise acts of absolute ownership over other omitted property, and subsequently filed a report of full payment of its capital stock, as well as two annual reports. (*Withrow v. Slayback*, 507.)

27. CORPORATIONS—FAILURE TO FILE ANNUAL REPORT—DIRECTOR'S LIABILITY—INDORSEMENT OF NOTE BY CORPORATION AND PAROL PROOF OF COMPANY'S LIABILITY. If the superintendent and an officer of an incorporated company signs a promissory note given in payment of a preceding indebtedness due by the company, which, by its treasurer, indorses the note, and the payee seeks to charge the directors of the corporation with the debt for having failed to file an annual report, under a statute which makes them answerable for all debts existing or contracted before the annual report is made, and the directors seek to avoid liability by standing on a strict contract of indorsement, and insisting that they are only contingently answerable when the note is due and the indorser charged, and that protest was after the time of the filing of the report, the plaintiff should be permitted to show, by parol evidence, the real transaction—that the corporation was, in reality, the principal debtor, and that the company was, therefore, answerable to the plaintiff before the default in filing the report was cured. (*Withrow v. Slayback*, 507.)

28. CORPORATIONS—MEETINGS—WANT OF NOTICE.—A meeting of the directors of a corporation held without notice to absent directors, or the existence of such an emergency as excuses notice to them, renders the business transacted at such meeting void. (*Singer v. Salt Lake etc. Mfg. Co.*, 773.)

29. CORPORATIONS—MEETINGS—PRESUMPTION AS TO REGULARITY.—If it appears that a special meeting of the directors of a corporation was held and that a quorum was present, it must be presumed that due notice of the meeting was given and that all steps necessary to constitute it a regular and valid meeting were taken. (*Singer v. Salt Lake etc. Mfg. Co.*, 773.)

30. CORPORATIONS—INSOLVENCY—TRUST DEED.—The insolvency of a corporation at the time a trust deed is authorized and executed by it does not alone render the instrument void. (*Singer v. Salt Lake etc. Mfg. Co.*, 773.)

31. CORPORATIONS—TRUST DEED—EXECUTION OF.—If a committee is authorized by the board of directors of a corporation to procure a loan for it and the officers who execute a trust deed to secure such loan are expressly authorized to do so by the board of directors and the by-laws of the corporation, the validity of the deed cannot be assailed on the ground that it is not signed by the president and secretary of the corporation. (*Singer v. Salt Lake etc. Mfg. Co.*, 773.)

32. CORPORATIONS—TRUST DEED—DIRECTOR DEALING WITH CORPORATION.—If, in the execution of a trust deed by a corporation, there is an entire absence of want of good faith, fraud and collusion and the corporation is a going concern, a stockholder or director is not prohibited from dealing with it. In such case the mere fact that a director furnished a portion of the money does not vitiate the trust deed given to secure the loan. Contracts made by a corporation with its officers are not void per se, but will be carefully scrutinized in equity and set aside, if not made in the utmost good faith. (*Singer v. Salt Lake etc. Mfg. Co.*, 773.)

33. CORPORATIONS — MEETINGS — NOTICE.—As a general rule, notice must be given in some way to all directors of the meetings of the board, where the by-laws and rules of the corporation do not provide the time and place of meeting, in order to render them valid. To this rule there are exceptions, as where such an emergency exists as justifies immediate action on the part of the board, and the giving of notice to all the members is not practicable, or where a director secretes himself in order to prevent a meeting, or is beyond the reach of notice. (*Singer v. Salt Lake etc. Mfg. Co.*, 773.)

34. CORPORATIONS—MEETINGS—PRESUMPTIONS AS TO REGULARITY.—If meetings of a legally constituted board of directors have been held, and business within the scope of and pursuant to the purposes for which the corporation was organized has been transacted, the presumption is, that such meetings were regularly called, convened, and held for the transaction of such business, and the onus probandi is upon him who maintains the contrary to allege and prove that they were not so called and held. (*Singer v. Salt Lake etc. Mfg. Co.*, 773.)

35. CORPORATIONS.—THE RESIDENCE OF A CORPORATION is the state of its creation. (*Turcott v. Railroad*, 661.)

36. CORPORATIONS — FOREIGN — FILING OF CHARTER—CONSTRUCTION OF STATUTE.—The purpose of a statute requiring foreign corporations doing business within the state to file and register their charters, is to enable them to do business, own or acquire property, and be enable to sue, but not to exempt them from suit if they disregard the statute or to estop them from making defense if so sued. (*Turcott v. Railroad*, 661.)

37. CORPORATIONS — FICTITIOUS SUBSCRIPTIONS TO STOCK—VALIDITY OF FRAUD.—Fictitious or colorable subscriptions to stock, made and used with the intent to induce other persons to subscribe, with the secret understanding that no liability shall attach to them by reason of their subscriptions, and that they shall thereafter be allowed to withdraw them, do not operate as a fraud upon bona fide subscribers, for they are as valid and binding upon the subscribers as if they had been originally made in good faith, and will be upheld and so treated by the courts. Hence, such subscriptions do not give a bona fide subscriber a right to avoid his subscription. (*Wilson v. Hundley*, 837.)

See Action; Appeal, 5; Contempt, 2-5; Evidence, 5, 7; Insurance, 1, 2; Limitations of Actions, 9, 10; Municipal Corporations, 12.

COTENANCY.

1. COTENANCY—ADVERSE POSSESSION BETWEEN COTENANTS—NOTICE.—In order that exclusive possession of the land of the cotenancy by one cotenant, accompanied by hostile acts and claims of ownership, may amount to an ouster of his cotenant, such acts and declarations must be known to the latter. Actual notice must be shown, but it may be by circumstantial evidence (*Casey v. Casey*, 190.)

2. COTENANCY — ADVERSE POSSESSION—EVIDENCE.—To prove adverse possession by one cotenant of the land of the cotenancy, his declarations claiming sole ownership are admissible in evidence though not made in the presence of his cotenant. (*Casey v. Casey*, 190.)

3. COTENANCY—ADVERSE POSSESSION BETWEEN COTENANTS.—Exclusive occupancy by one tenant in common, ac-

accompanied by acts and declarations of sole ownership, if known to his cotenant, will amount to ouster so that his possession may ripen into title. (*Casey v. Casey*, 190.)

4. **COTENANCY—DUTY OF COTENANT TO PAY TAXES.**—A widow entitled to unassigned homestead and dower in property on which she resides, and holding with her children in cotenancy, is bound, in order to protect their common interest, to contribute toward the taxes upon a private alley constituting part of the common property. (*Goralski v. Kostuski*, 98.)

5. **COTENANCY—PRIVATE ALLEY.**—Owners of lots abutting upon a private alley, established for their common benefit and appurtenant to each lot, have a unity of possession and are cotenants therein. (*Goralski v. Kostuski*, 98.)

6. **COTENANCY—TAX TITLES.**—While cotenants remain in the actual possession of the common property and maintain the unity of possession by actual common use, neither, as against his fellow tenants, by purchasing a tax title upon the common premises can obtain a title that is not subject to the election of the cotenants, within a reasonable time, to avail themselves of the purchase by contributing their proper proportion to reimburse the purchasing tenant. (*Goralski v. Kostuski*, 98.)

7. **COTENANCY—RIGHTS OF WIDOW OF ONE COTENANT—SECURING ADVERSE TITLE.**—Where one of two cotenants dies, the dower interest of his widow in the land of the cotenancy brings her within the general rule that, where one is interested with another in an estate, an implied obligation arises to sustain the common interest, and she cannot acquire and set up an adverse title to deprive the other cotenant of his interest as by purchasing the property at a sheriff's sale had under proceedings to collect arrears in ground rent. (*Enyard v. Enyard*, 623.)

See Devise, 1; Homestead, 2.

COUNTERCLAIM.

See Corporations, 9.

COUNTIES.

See Schools.

COURTS.

COURTS—PRESUMPTION AS TO JURISDICTION.—A county court, with a clerk and seal, is a court of record. Hence, if it enters a judgment upon a warrant of attorney to confess judgment, upon which an action is brought in another state, such court will there be presumed to have been a court of general jurisdiction. (*Van Norman v. Gordon*, 304.)

See Criminal Law, 4; Interstate Commerce, 1; Jurisdiction; Municipal Corporations, 4.

CRIMINAL LAW.

1. **CRIMINAL LAW—ABANDONMENT OF CHILD.**—Under a statute providing that "if any father shall willfully and voluntarily abandon his child, leaving it in dependent and destitute condition, he shall be guilty of a misdemeanor, in order to constitute the offense of abandonment, there must be an actual desertion, followed by a refusal to support, and the absence of either of such elements prevents the offense from being made out. (*Gay v. State*, 68.)

2. CRIMINAL LAW—ABANDONMENT OF CHILD.—If, after a completed act of desertion, a father has been convicted under a statute making it a misdemeanor for "any father to willfully and voluntarily abandon his child, leaving it in a dependent and destitute condition," there can be no new act of abandonment until a return to the discharge of the parental obligation, and no new offense of abandonment until such a return, followed by another act of desertion, and this although the original abandonment is willfully and voluntarily continued and the child remains dependent and destitute. (*Gay v. State*, 68.)

3. CRIMINAL LAW — PRELIMINARY EXAMINATION — WAIVER.—If a person accused of crime, on being arrested and brought before an examining magistrate, voluntarily pleads guilty, he thereby waives his right to a preliminary examination. (*Latimer v. State*, 403.)

4. CRIMINAL LAW—PRELIMINARY EXAMINATION.—DISTRICT COURTS ARE WITHOUT JURISDICTION to try, on information, one accused of crime, except he be a fugitive from justice, unless he has first been accorded the privilege of a preliminary examination or has waived that privilege. (*Latimer v. State*, 403.)

5. CRIMINAL LAW—A PRELIMINARY EXAMINATION is a right accorded and a privilege granted by law to everyone accused of crime; but it is privilege which the accused may waive. (*Latimer v. State*, 403.)

6. CRIMINAL LAW.—A PRELIMINARY EXAMINATION is in no sense a trial of a person accused of crime. It is not even necessary that the person charged with a crime, on being brought before a magistrate, should be asked to plead, or that he should plead. (*Latimer v. State*, 403.)

7. CRIMINAL LAW—PRELIMINARY EXAMINATION.—The object of a preliminary examination is to ascertain whether the crime charged has been committed, and, if so, whether there is probable cause to believe that the accused committed it. (*Latimer v. State*, 403.)

8. CRIMINAL LAW—DRUNKENNESS AS DEFENSE.—While voluntary intoxication is not of itself a complete defense for one who is charged with the commission of an offense, yet evidence that the accused was intoxicated when it is alleged he committed the crime is admissible as a circumstance tending to show that the act of the accused was not premeditated, and for the purpose of ascertaining and determining the status and condition of his mind at that time. (*Latimer v. State*, 403.)

9. CRIMINAL LAW—EVIDENCE—GOOD CHARACTER.—Previous good character of the accused in a criminal case is a fact which he is entitled to have submitted for the consideration of the jury, precisely as any other circumstance favorable to him, without any disparagement by the court. (*Latimer v. State*, 403.)

10. CRIMINAL LAW—PRELIMINARY EXAMINATION—RECOGNIZANCE.—If an accused, on being brought before the examining magistrate, waives his right to a preliminary examination, or pleads guilty to the crime with which he is charged, the magistrate should recognize him to appear in the district court, and enter upon his docket the proceedings that actually occur, and a duly certified transcript of this record filed in the office of the clerk of the district court invests that court with jurisdiction to try the accused on information for the crime with which he was accused before the examining magistrate. (*Latimer v. State*, 403.)

11. **CRIMINAL LAW—DRUNKENNESS AS DEFENSE.**—If an accused was so drunk at the time he is alleged to have committed the crime charged as to render him unconscious of his act, incapable of controlling his will, and forming and entertaining a felonious intent, his intoxication is a defense. (*Latimer v. State*, 403.)

12. **CRIMINAL LAW—CONFESSIONS—ADMISSIBILITY OF VOLUNTARY STATEMENTS.**—Voluntary statements made by a man of ordinary intelligence and education to police officers after his arrest, not as evidence nor as the result of an examination in a judicial proceeding, although reduced to writing and verified by him, are admissible in evidence on the trial of the crime for which he was arrested, if not induced by any promise, threat, or improper influence, although he was not informed by those to whom he made the statements that they might be used against him on his subsequent trial. (*People v. Kennedy*, 557.)

13. **CRIMINAL LAW—CONFESSIONS.—TEST OF ADMISSIBILITY** of the statement of a person accused of crime, whether made in the course of judicial proceedings or not, is whether it is made voluntarily, and that must be determined by its nature and the circumstances under which it is made. (*People v. Kennedy*, 557.)

14. **CRIMINAL LAW—CONFESSIONS IMPROPERLY OBTAINED—ADMISSIBILITY.**—If peace officers, by covert threats, doubtful and uncertain promises, acts of intimidation, or other questionable means, procure incriminating statements from persons under arrest, and subsequently charged with crime, they are inadmissible against them. (*People v. Kennedy*, 557.)

15. **AN INDICTMENT FURNISHES NO PROOF** that an accused is guilty of a capital crime, much less that he is guilty of a capital crime of which the proof is evident. (*Ex parte Newman*, 740.)

See Appeal, 3, 4; Bail; Habeas Corpus, 1, 2; Homicide; Rape; Trial, 4, 6, 7; Witnesses, 12.

DAMAGES.

1. **DAMAGES—MEASURE OF, FOR FALSE REPRESENTATIONS IN SALE OF BOND.**—The measure of damages, in an action for false representations in the sale of a bond, is the difference between the actual value of the bond, at the time of purchase, and its value if it had been what it was represented to be, secured as represented. Subsequent events may be considered in arriving at the two values, at the time of the purchase, though they show the market value of the bond to have been worthless. (*Whiting v. Price*, 262.)

2. **DAMAGES—MEASURE OF—DESTRUCTION OF PROPERTY HAVING NO MARKET VALUE.**—For the destruction of household goods and wearing apparel having no recognized market value, the measure of damages is their actual value, which may be determined by evidence of their original cost, the extent of their use, and their condition at the time of destruction. (*McMahon v. Dubuque*, 143.)

3. **DAMAGES—MEASURE OF—DESTRUCTION OF DWELLING-HOUSE.**—The measure of damages for the destruction of a dwelling-house by fire is its actual and not necessarily its market value. (*McMahon v. Dubuque*, 143.)

4. **DAMAGES—INJURY TO HEAVY MACHINERY THROUGH NEGLIGENCE OF TRUCKMEN—PUTTING IN CONDITION FOR USE.**—If truckmen, in moving a large and heavy machine for planing iron, negligently break and injure it, the expense of restoring it to a condition for uses is a proper element of damage, in an action

for such injury, for it is plain that the machine is not an article that the plaintiff can procure in the market at any time. Hence, if that item of expense alone exceeds the verdict, it is unnecessary to consider or discuss other items admitted in evidence upon the question of damages. (*Jackson etc. Works v. Hurlbut*, 432.)

See **Assault; Railroad Companies**, 17; **Telegraph Companies**, 3, 6; **Waterworks and Water Companies**, 1.

DEATH.

See **Negligence**, 8.

DEBT.

See **Corporations**, 26; **Taxation; Vendor and Purchaser**, 1.

DECISIONS.

DECISIONS OF SISTER STATES—WEIGHT OF.—In a case of first impression in a state, the decisions in other states have only persuasive authority, and the consideration to which the reasoning therein is entitled. (*Gorrell v. Water Sup. Co.*, 598.)

DEEDS.

1. **DEEDS—RECITALS IN AS TO PAYMENT—EVIDENCE TO CONTRADICT.**—Although it is always competent to contradict the recital in a deed as to the amount paid, in an action involving the recovery of the purchase money, or as to the measure of damages in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed in creating or passing a title to the estate thereby granted. (*Kendrick v. Life Ins. Co.*, 592.)

2. **DEEDS—MARRIAGE AS A VALUABLE CONSIDERATION.**—A deed made by a man to his intended wife, followed by marriage, is conclusively presumed to be in consideration of marriage, and is based on a valuable consideration. (*Snyder v. Grandstaff*, 863.)

3. **DEEDS UPON CONSIDERATION OF MARRIAGE—VALIDITY OF.**—Under the statute of Virginia, conveyances upon consideration of marriage are void as to existing creditors, but not as to those who claim to be paramount purchasers under a will. (*Snyder v. Grandstaff*, 863.)

4. **DEEDS—PURCHASE BY DEVISEES UNDER A WILL—CONVEYANCE TO INTENDED WIFE, FOLLOWED BY MARRIAGE—RIGHTS OF SURVIVORSHIP VESTED IN WIDOW.**—When it appears that a whole estate was devised to the testator's three grandchildren, "to be equally divided between them, share and share alike, but, on the death of either of them without issue, his or her share should pass to the survivors or survivor, and, in case all died without issue, then to collateral kindred"; that the devisees afterward apportioned the estate among themselves, and each, by a deed expressly stating his intention and desire, conveyed to the others all of his right, title, and interest in the property allotted to such other; and that one of the devisees, contemplating marriage, deeded his share to his intended wife, marrying her on the same day, but died shortly afterward, without issue, or possibility of issue, it must be held that all rights of survivorship in the other two devisees passed by their deeds to the deceased, and by the latter's deed became vested in his widow. (*Snyder v. Grandstaff*, 863.)

5. DEEDS—REGISTRY OF, BY SUBSEQUENT PURCHASER, AS NOTICE—OBJECT OF REGISTRY LAWS.—The registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered, for registry laws are not intended to affect the holders of antecedent rights, but only such persons as are compelled to search the records in order to protect their own interests. (*Lynchburg Perpetual etc. Co. v. Fellers*, 851.)

See Corporations, 30-32; Fraudulent Conveyance; Liens.

DEFINITIONS.

- "Common carrier." (*Jackson etc. Works v. Hurlbut*, 432.)
- Conditions precedent and subsequent. (*Burdis v. Burdis*, 825.)
- "General guaranty." (*Tidioute S. Bank v. Libbey*, 907.)
- "Incidental power." (*Nicollet Nat. Bk. v. Frisk-Turner Co.*, 334.)
- "Malice." (*Brown v. Brown*, 574.)
- "Original package." (*Austin v. State*, 703.)
- "Special guaranty." (*Tidioute S. Bank v. Libbey*, 907.)

DEPOSIT OF TITLE DEEDS.

See Mortgages, 7, 8.

DESCENT.

DESCENT—ILLEGITIMATE CHILD AS AN HEIR.—Under the statutory law of Massachusetts, an illegitimate child is the heir of his mother; but at common law he could not be an heir, even of his mother. (*Hayden v. Barrett*, 295.)

DEVISE.

1. DEVISE — CONSTRUCTION — COTENANCY.—A will by which land is devised to specified legatees, to have and to hold in common for a home and support so long as they remain together, and should one or more leave they can take such as given them individually in this will, but have no share or control of this that is given in common without the consent and signature of those that remain on the place," with restriction on the right of either to alienate or lease any part of the land without the consent of all, constitutes such legatees cotenants in the lands devised, with a condition subsequent that the whole must be used for the support of such of the legatees as choose to remain on the place. (*Harrison v. Harrison*, 60.)

2. DEVISE — REJECTION OF CONDITION INCAPABLE OF PERFORMANCE.—A devise of land to specified legatees, "to have and to hold in common for a home and support as long as they remain together, and should one or more leave they can take such as given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place," imposes a condition subsequent that the whole land be used for the support of such legatees as choose to reside thereon, but if such condition becomes incapable of performance, it must be rejected and the devise held to be absolute. Hence, if one of the legatees is forced to remove from the land by the cruel treatment of another, the former is entitled to his share of the estate, and the full and absolute use thereof freed of the condition. He is also entitled to the immediate possession of his share of the estate, and can exercise the right of partition or seek any other remedy afforded to a cotenant. (*Harrison v. Harrison*, 60.)

3. DEVISE—REMAINDER TO PERSONS NOT IN ESSE—JURISDICTION—SALE OF PROPERTY.—Where property is devised for life, with a remainder over to persons not in esse, the life tenant still living, a court has no power to order a sale of the property, because there can be no one before the court to represent the interest of the remaindermen. (Yancey's Case, 577.)

4. DEVISE—GENERAL REMAINDER—REMAINDERMEN BEFORE THE COURT—JURISDICTION—SALE OF PROPERTY. Where property is devised for life, with a general remainder over in which there is no element of survivorship, a court may order a sale of the property where all the remaindermen living are before it, since the remaindermen represent a class, and those who may afterward be born are concluded by the action of the court upon those of the same class. (Yancey's Case, 577.)

5. DEVISE—REMAINDERMEN—SALE OF PROPERTY—TITLE OF PURCHASER.—When property, which is devised for life with a general remainder over, is sold under an order of court, all the remaindermen living being before the court, the purchaser will acquire a good title against afterborn children of the life tenant. (Yancey's Case, 577.)

6. DEVISE—REMAINDER TO UNDETERMINED PERSONS—JURISDICTION—SALE OF PROPERTY.—Where property is devised for life, with a remainder over to "such children as should be living at the death of the life tenant," a court has no power to order a sale of the property, for until the death of the life tenant it could not be known who would take. (Yancey's Case, 577.)

7. LEGACIES—DEVISES—IMPOSSIBILITY OF PERFORMANCE OF CONDITION SUBSEQUENT—EFFECT OF.—While there is a difference between a legacy and a devise where the condition is precedent, there is no difference where the condition is subsequent; but in the latter case the estate to which the condition is annexed, whether it is land or a money legacy, if the performance of the condition is rendered impossible, becomes, by that event, absolute in the devisee as well as in the legatee. (Burdis v. Burdis, 825.)

8. DEVISE—IMPOSSIBILITY OF PERFORMANCE OF CONDITION SUBSEQUENT—EFFECT OF.—If a condition subsequent is annexed to a devise of real estate, and its performance becomes impossible, without the fault of the devisee, the estate is not defeated or forfeited, but the devisee will hold the property by an absolute title, as if no condition had been annexed to the devise. (Burdis v. Burdis, 825.)

9. DEVISE—FAILURE OF, FOR IMPOSSIBILITY OF PERFORMANCE OF CONDITION PRECEDENT.—If a condition precedent is annexed to a devise of real estate, and its performance is or becomes impossible, the devise fails, although there is no default or laches on the part of the devisee himself. (Burdis v. Burdis, 825.)

See Deeds, 4.

DOMICILE.

See Corporations, 1, 35.

DOWER.

1. DOWER, STATUTORY—WHEN SUBJECT TO PAYMENT OF HUSBAND'S DEBTS.—In Minnesota, the widow's statutory one-third in the real estate of her husband is "subject, in its just proportion with the other real estate, to the payment of such debts

of the deceased as are not paid from the personal estate." (Merrill v. Security Trust Co., 312.)

2. **DOWER—ASSIGNMENT FOR BENEFIT OF CREDITORS.** Where a married man executes, under the insolvent law, an assignment of all his nonexempt property for the benefit of creditors (his wife not joining), the assignee's title to the real estate assigned is not subject to the wife's inchoate right. (Merrill v. Security Trust Co., 312.)

3. **DOWER—ESTATE OF—NATURE.**—The statutory dower of a widow is not treated as a lien upon land, but as an interest in it. It is an estate given by the intestate laws. (Enyard v. Enyard, 623.)

DRUNKENNESS.

See Criminal Law, 8, 11.

EJECTMENT.

See Railroad Companies, 6.

ELECTION.

See Attachment, 11; Contracts, 13.

ELECTRIC COMPANIES.

ELECTRIC LIGHT COMPANIES—INJURY TO LINEMAN—ACTION—IMMATERIAL EVIDENCE.—A lineman who was injured while in the employ of an electric lighting company by a decayed pole breaking below the surface of the ground, and falling—upon him while he was at work upon it, cannot maintain an action against the company for the injury without showing that the company was negligent; and this is not done by proof that the company failed to inspect the pole before the accident. Such evidence is immaterial, for the company owed him no duty to inspect it. On the contrary, in any case where the apparent age of the pole was such as to make it probable that it was not strong enough to sustain a man working upon it, due care on the part of the lineman would require him to examine it just below the surface of the ground before risking himself upon it. (McIsaac v. Northampton Elec. L. Co., 244.)

See Master and Servant, 1, 2.

ELEVATORS.

ELEVATORS — DEFECTIVE — INJURIES RESULTING THEREFROM—CONSTRUCTION OF PLEADING.—In an action for injuries sustained in operating an elevator which contained a secret defect alleged to be unknown to plaintiff, an allegation that the elevator would not sustain the weight ordinarily and usually placed upon it, but would drop to the ground, and was thereby a nuisance, will be construed as meaning that the elevator was liable to fall at any time in the course of the ordinary and necessary use thereof, and not as meaning that the elevator fell whenever used, so that all who used it must have known of the defect. (Anderson v. Hayes, 930.)

EMINENT DOMAIN.

1. **EMINENT DOMAIN.—THE AWARD OF APPRAISERS** in condemnation proceedings operates as a judgment between the parties, and is governed by the same rules that are ordinarily applied to judgments of courts. Such an award, or a verdict and judgment on appeal therefrom, has the same force as an ordinary

judgment rendered by a court of competent jurisdiction. It is conclusive upon the parties and privies, but is not binding upon strangers. (Charleston etc. Ry. Co. v. Hughes, 17.)

2. EMINENT DOMAIN.—A RAILROAD COMPANY, by condemnation proceedings, acquires whatever interest the person against whom such proceedings are had has in the land, and no more. (Charleston etc. Ry. Co. v. Hughes, 17.)

3. EMINENT DOMAIN—INTEREST ACQUIRED BY RAILROAD COMPANY.—A railroad company which constructs its road over land, the title to which is not fixed and determined, acquires the interest of all those with whom it deals by negotiation or against whom it proceeds by condemnation, but takes the risk of other persons making claims in the future, whether they are left out of the negotiations or proceedings by mistake or from necessity. (Charleston etc. Ry. Co. v. Hughes, 17.)

4. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS ARE NO MORE THAN A COMPULSORY SALE of all the owner's interest in the property, and no one can be thus compelled to sell who is not a party to the judgment rendered by the tribunal which is erected for this purpose. (Charleston etc. Ry. Co. v. Hughes, 17.)

5. EMINENT DOMAIN—JURISDICTION.—ONE WHO CANNOT BE AND IS NOT NOTIFIED, is not bound by the award or judgment. (Charleston etc. Ry. Co. v. Hughes, 17.)

6. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—CONCLUSIVENESS AGAINST UNKNOWN OWNERS.—If the condition of the title to property at the time of condemnation proceedings is such that notice cannot be given to all interested, notice to such as are definitely known to be interested is not sufficient to deprive of their rights others whose identity is unknown, but whose interest in the property is ascertainable. (Charleston etc. Ry. Co. v. Hughes, 17.)

7. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—CONCLUSIVENESS OF—LIFE ESTATE AND REMAINDER.—If, at the time condemnation proceedings were had, there were two estates in the property, one a life estate, and the other a contingent remainder, the fact that it was impossible to ascertain the persons who would eventually take as remaindermen does not authorize the conclusion that the interest of such remainderman was acquired by proceedings against the life tenant, who cannot be held to represent them. (Charleston etc. Ry. Co. v. Hughes, 17.)

8. EMINENT DOMAIN—ESTOPPEL—CONDEMNATION PROCEEDINGS against the assignee of a life tenant, to whom the entire amount awarded as damages has been paid, cannot be pleaded in bar of the right of the remainderman in the same property to have compensation for his interest after the termination of the life estate. (Charleston etc. Ry. Co. v. Hughes, 17.)

9. EMINENT DOMAIN.—THE LEGISLATURE CANNOT AUTHORIZE permanent and substantial injury to private property without making compensation. (Garvey v. Long Island R. R. Co., 550.)

See Railroad Companies, 23.

EQUITY.

1. EQUITY—DISCOVERY OF LUNATIC'S PROPERTY—SCOPE OF PRELIMINARY INJUNCTION.—Under a bill in equity brought by the committee of a lunatic against the latter's husband for the discovery of property of the lunatic kept by the husband in

a box in a safe deposit company, a preliminary injunction should go no farther than is necessary for the protection and enforcement of the lunatic's rights to property in such box, and should not infringe upon defendant's right to take therefrom property belonging to him and not claimed by the committee. (*Equitable Trust Co. v. Garis*, 644.)

2. EQUITY—JURISDICTION—SPECIFIC PERFORMANCE.—The rule that equity will not entertain jurisdiction to decree specific performance respecting goods, chattels, stocks, and other things of a merely personal nature, is limited to cases where compensation in damages will furnish a complete remedy. Where the wrong is a betrayal of confidence, equity will decree restitution, which may be enforced specifically against the wrongdoer. (*Steinmeyer v. Siebert*, 641.)

3. EQUITY—JURISDICTION—DISCOVERY OF LUNATIC'S PROPERTY.—The committee of a lunatic is the proper party to maintain a bill in equity against the lunatic's husband for the discovery and delivery of possession of muniments of title, negotiable securities, and personal property, belonging to the lunatic's estate and in the possession of the husband, where the latter denies her title, or there is reason to apprehend that he will treat such property adversely to her interest. (*Equitable Trust Co. v. Garis*, 644.)

4. EQUITY—ADEQUATE LEGAL REMEDY—PLEADING.—The objection that the plaintiff in a suit in equity has an adequate legal remedy must be made by demurrer or answer, and, if not so made, is deemed waived, and cannot be raised by demurrer *ore tenus*. (*Hoff v. Olson*, 903.)

5. EQUITY—JURISDICTION—ADEQUATE LEGAL REMEDY.—The ground upon which equity refuses to take cognizance of a case in which an adequate legal remedy exists is not jurisdictional, but merely a rule of practice, upon which the action will be dismissed if the attention of the court is called to it at the proper time and in the proper manner. (*Hoff v. Olson*, 903.)

6. EQUITY—SUFFICIENCY OF COMPLAINT—THREATENED INJURY.—A complaint in equity sufficiently shows a threatened unlawful invasion of plaintiff's property rights when it alleges that defendant threatens to tear down a partition fence separating his and plaintiff's property; that such act would result in irreparable injury to plaintiff, and that defendant is insolvent. The objection that plaintiff has an adequate remedy being waived, such complaint is sufficient to maintain an action to restrain the threatened removal of the fence. (*Hoff v. Olson*, 903.)

7. EQUITY HAS NO JURISDICTION TO CONSTRUE MUNIMENTS OF TITLE in a case where one holds adversely to the instrument under which another claims, whether a deed or a will, for it is the province of courts of law to construe instruments which involve legal rights. Hence, the party out of possession cannot invoke the aid of a court of equity to determine who has the better right. (*Snyder v. Grandstaff*, 863.)

8. EQUITY—BILL FOR REFORMATION OF DEED—WHEN NOT DEMURRABLE.—Equity is the proper forum for the reformation of a deed and a claim, in a bill for that purpose, of a mutual mistake, prevents the bill from being demurrable, though it fails to allege notice to a purchaser for value. The complainant must, if true, prove notice to a bona fide purchaser for value, but the defense that he had no notice must be made by plea or answer. (*Snyder v. Grandstaff*, 863.)

See Intervention; Judgment, 3-5; Pleading.

ESTATES.

ESTATES—ESTIMATE OF VALUE—LIFE ESTATE.—The value of a life estate should be estimated, not in the light of its actual duration as subsequently developed, or the rents received in that time, but at its value at the time of purchase, estimated according to the rules usually adopted in estimating the value of life estates. (*Gonce v. McCoy*, 714.)

See Devise, 3-6; Eminent Domain, 7; Estates of Decedents; Insane Persons, 2.

ESTATES OF DECEDENTS.

ESTATES OF DECEDENTS—ASSETS DISPOSED OF BY SOLE HEIR—RECOVERY BY ADMINISTRATOR.—Where, before an administrator is appointed of an estate, against which there are no debts proved or to be proved, a sole heir and distributee makes an equitable assignment of all her interest and the interest of the estate in certain personal property, such assignment is binding upon an administrator subsequently appointed on the petition of such sole heir and distributee, and he cannot recover the property disposed of. (*Cooper v. Hayward*, 330.)

ESTOPPEL.

1. **ESTOPPEL.**—Where one, by his willful or fraudulent conduct, causes another to believe in the existence of certain facts, who is thereby induced to act on the belief, and does so in good faith, and parts with his money in reliance thereon, the former is estopped from denying the existence of such facts. (*Moffett v. Parker*, 319.)

2. **ESTOPPEL—NECESSITY TO PLEAD.**—Where a party has an opportunity to plead an estoppel, and voluntarily omits to do so, but goes to the issue on the facts, he thereby waives the estoppel, and the jury is at liberty to find according to the facts of the case. (*Bear v. Commissioners*, 586.)

3. **ESTOPPEL—PLEADING—DEMURRER.**—Where the advantage might have been taken of an estoppel by means of a demurrer, and the party fails to so take advantage of it, he will be held to have waived the estoppel. (*Bear v. Commissioners*, 586.)

See Adoption, 2; Eminent Domain, 8; Insurance, 12; Judgment, 20, 21; Mechanic's Lien, 3; Mortgages, 10; Railroad Companies, 7.

EVIDENCE.

1. **EVIDENCE—FOREIGN LAW—QUESTION OF FACT.**—If the evidence of foreign law consists of reports of judicial decisions, the question of what the law is becomes one of fact, where the decisions are conflicting, or where inferences of fact must be drawn. (*Hancock Nat. Bank v. Ellis*, 232.)

2. **EVIDENCE—FOREIGN LAW—QUESTION OF LAW.**—If the evidence of foreign law consists entirely of statutes or reports of judicial decisions, the construction and effect of the statutes and decisions are usually for the court alone. (*Hancock Nat. Bank v. Ellis*, 232.)

3. **EVIDENCE.—THE LAWS OF ANOTHER STATE** are facts to be proved. (*Hancock Nat. Bank v. Ellis*, 232.)

4. **EVIDENCE—PRESUMPTION AS TO LAW OF ANOTHER STATE.**—The law of another state on a subject involved in litigation

is presumed to be the same as that of the state in which the litigation is being carried on. (*Melton v. Atkinson*, 416.)

5. EVIDENCE—NOTE INDORSED BY CORPORATION—HISTORY OF INDEBTEDNESS—PAROL.—If the plaintiff, in a suit on a promissory note, of which he is the payee, seeks to charge the directors of a corporation upon a contract of indorsement made by the corporation when the note was executed, parol evidence of the history of the indebtedness, which resulted in the note, should be received and submitted to the jury. (*Witherow v. Slayback*, 507.)

6. EVIDENCE—CONTRACT OF INDORSEMENT—INTENTION.—PAROL EVIDENCE is admissible, as between the immediate parties to a contract of indorsement, to ascertain their intention; all the facts and circumstances which took place at the time of the transaction may thus be shown. (*Witherow v. Slayback*, 507.)

7. EVIDENCE—NOTE INDORSED BY CORPORATION—PAROL PROOF THAT COMPANY IS PRINCIPAL DEBTOR. The plaintiff, in a suit on a promissory note, of which he is the payee, and which is indorsed by a corporation, through its treasurer, has a right to show, if he can, by parol evidence, to the satisfaction of a jury, that the corporation is really his principal debtor in the transaction. (*Witherow v. Slayback*, 507.)

8. EVIDENCE—REASONABLE CERTAINTY—STRONG PROBABILITIES.—A proposition is reasonably certain when it is supported by the strong probabilities. (*People v. Fielding*, 495.)

9. EVIDENCE—JUDICIAL NOTICE—DELETERIOUS NATURE OF CIGARETTES.—A court may take judicial notice that cigarettes possess no virtue, are inherently bad, and wholly noxious and deleterious to health. (*Austin v. State*, 703.)

10. EVIDENCE—ADMISSIONS AGAINST INTEREST—TESTIMONY IN SIMILAR CASE.—Where, in the course of a trial in an action for negligence, plaintiff is permitted to read to the jury portions of cross-examination of the defendant, in a former trial involving identical questions, for the purpose of showing admissions by defendant against his interest, defendant should be allowed to read the entire examination in chief to the jury. (*Weeks v. McNulty*, 693.)

11. EVIDENCE—SITUATION EXISTING AFTER INJURY COMPLAINED OF.—In an action against a water company for death occasioned by the use of impure water furnished by the defendant, it is error to admit evidence of experts as to tests made of the water some time after the occurrence complained of. (*Green v. Ashland W. Co.*, 911.)

12. EVIDENCE—OPINION OF WITNESSES.—In an action against a water company for injury occasioned by the defendant's furnishing impure water, it is not proper to admit opinion evidence as to the duty of the defendant with reference to testing the water supply. (*Green v. Ashland W. Co.*, 911.)

See Appeal, 1, 8, 9; Cotenancy, 2; Criminal Law, 9, 12-15; Deeds, 1; Electric Companies; Homicide, 3, 4, 6, 11, 12, 14-17; Innkeepers, 2; Insurance, 15; Negotiable Instruments, 5-7; Presumptions; Railroad Companies, 3, 12, 13; Rewards; Telegraph Companies, 7; Waterworks and Water Companies, 6; Wills, 6, 7.

EXECUTION.

1. EXECUTION—SALES—CAVEAT EMPTOR.—In execution and judicial sales of land, except in special cases, there is no war-

ranty of title or quality, but the rule of caveat emptor applies, and the purchaser gets virtually nothing but the quit-claim title of the debtor defendant. (*Gonce v. McCoy*, 714.)

2. EXECUTION—SALES—JUDGMENT CREDITOR AS PURCHASER—DEFECT OF TITLE.—A judgment creditor who bids the amount of his judgment on land and thus satisfies it is not entitled to have the satisfaction vacated and the judgment reinstated because he only obtained a life estate in the land, when he believed he was getting a fee simple estate, and bought under that belief. If he obtains any beneficial interest by his purchase, he is not entitled to such relief. (*Gonce v. McCoy*, 714.)

See Attachment; Contempt, 2.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—CONTRACTS—ACTION ON PROMISSORY NOTE FOR BENEFIT OF ANOTHER.—Where a promissory note is taken in the name of one party for the benefit of another, the administrator of the payee may maintain an action on it. (*Cooper v. Hayward*, 330.)

See Estates of Decedents.

EX POST FACTO LAWS.

See Statutes, 1-8.

FALSE REPRESENTATIONS.

See Damages, 1.

FINDINGS.

See Appeal, 7.

FOODS.

See Police Power, 24.

FRAUD.

1. FRAUD—FALSE REPRESENTATIONS IN SALE OF BOND—RELYING ON REPRESENTATIONS—QUESTION FOR JURY.—In an action for false representations in the sale of a bond, where it appears that the defendant referred the plaintiff to the sources of his information, and advised the plaintiff to consult the persons named, the question as to whether he ought to have done so may depend on circumstances, and it is not improper to leave it to the jury. (*Whiting v. Price*, 262.)

2. FRAUD—FALSE REPRESENTATIONS IN SALE OF BOND—RETURN OF BOND.—In an action for false representations in the sale of a bond, the plaintiff is not required to return the bond to the defendant. (*Whiting v. Price*, 262.)

3. FRAUD—ACTION FOR FALSE REPRESENTATIONS IN SALE OF BOND—WHAT WILL SUPPORT.—Although a certain bond of an electric light company states that payment thereof is "secured by a first mortgage on all the property, rights, and franchises of said company (present and future acquired)," a representation made, in selling the bond, that it was secured by a mortgage of real estate of the value of half a million dollars, will support an action for false representations, where it appears that the company owned no real estate and that the bond was not secured by a mortgage of real estate. (*Whiting v. Price*, 262.)

See Contracts, 12-14; Corporations, 37; Insurance, 22; Joint Stock Companies; Judgment, 5; Municipal Corporations, 8; Rape, 1, 2.

FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCE—A VOLUNTARY DEED IS NOT FRAUDULENT AS TO DEBTS AFTERWARD CREATED. A voluntary deed will not be set aside at the instance of subsequent creditors of the grantor where no fraud is shown; and creditors whose debts were created after it was made and recorded cannot subject the property thereby conveyed upon the ground that it was executed in fraud of their rights. (New South B. & L. Assn. v. Reed, 858.)

GARNISHMENT.

See Attachment, 5-12.

GIFTS.

GIFTS—VALIDITY OF, WHERE OBLIGATIONS EXIST.—A man must be just before he is generous. He cannot, therefore, make a valid gift of his property and leave his obligations unsatisfied or unprovided for. (Moore v. Triplett, 882.)

GUARANTY.

1. GUARANTY—ASSIGNABILITY.—A guaranty is assignable with the obligations secured thereby, and goes with the principal obligation. It is enforceable by the same persons who can enforce the principal obligation. (Tidioute Sav. Bank v. Libbey, 907.)

2. GUARANTY — SPECIAL AND GENERAL DISTINGUISHED.—A general guaranty is one for acceptance by the public generally. A special guaranty is limited to the person to whom it is addressed, and usually contemplates a trust or reposes a confidence in some person. Such a guaranty may not be assignable until the right of action has arisen thereon. (Tidioute Sav. Bank v. Libbey, 907.)

3. GUARANTY—ASSIGNMENT OF PRINCIPAL OBLIGATION.—The transfer of a note secured by a general continuing guaranty carries with it the security which may be enforced by the transferee, though he took the note without knowledge of the security. (Tidioute Sav. Bank v. Libbey, 907.)

See Corporations, 5, 7.

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—MISAPPROPRIATION OF FUNDS.—If an unauthorized purchase is made by a guardian with the funds of his ward, the guardian, and all other persons who, with a knowledge of such illegal use, participate in the conversion of such money, are liable to the ward. (Howard v. Cassels, 44.)

2. GUARDIAN AND WARD.—RATIFICATION by a ward, by claiming the fruits of his guardian's unauthorized investment, precludes a denial of the vendor's right to proceed against the property purchased according to the contract to recover the balance due. The ward must adopt and ratify the whole contract or none of it. (Howard v. Cassels, 44.)

3. GUARDIAN AND WARD—PARTIES.—If a testamentary guardian enters into a contract for the purchase of land, pays part of the purchase money with the funds of his minor wards, and gives a note in his representative capacity for the balance, such wards

are not necessary parties, and cannot complain that they are not made parties to a suit by the vendor to recover on such note. (*Howard v. Cassels*, 44.)

4. **GUARDIAN AND WARD—RATIFICATION OF UNAUTHORIZED CONTRACT.**—If a guardian enters into an unauthorized contract for the purchase of land, pays part of the purchase money with the funds of his ward, and gives a note in his representative capacity for the balance, the ward cannot claim the fruits of such contract, and deny the right of the vendor to proceed against the property for the balance of the purchase money. If the ward ratifies the illegal act, such ratification relates to the contract of purchase, and he must ratify the contract as an entirety. He cannot take the part only which is favorable to him, but he must also take that other part which makes the land liable for the balance of the purchase money. (*Howard v. Cassels*, 44.)

5. **GUARDIAN AND WARD—CONTRACT FOR PURCHASE OF LAND—PARTIES.**—If a contract for the purchase of land entered into by a testamentary guardian, under which part of the purchase price is paid with funds of his wards, is authorized by law or the terms of the will, the guardian, as the legal representative of the wards, is the only necessary party to a suit by the vendor to recover the balance of the purchase price, and judgment against him binds the property of the wards in his hands, and, if such contract is not within the power of the guardian to make, it binds him in his individual capacity only, and does not bind the property of the wards. (*Howard v. Cassels*, 44.)

HABEAS CORPUS.

1. **HABEAS CORPUS—REVIEW OF ERRORS.**—Habeas corpus is not an appropriate proceeding to review mere errors and irregularities in a judgment of an inferior court in a criminal case. (*In re Fanton*, 418.)

2. **HABEAS CORPUS.—AN EXCESSIVE SENTENCE** imposed by a court having jurisdiction is merely erroneous and not void, and habeas corpus does not lie on behalf of the convicted prisoner to obtain relief therefrom. His remedy is by writ of error. (*In re Fanton*, 418.)

3. **HABEAS CORPUS—VOID JUDGMENT.**—If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus, but the judgment must be void and not merely erroneous. (*In re Fanton*, 418.)

4. **HABEAS CORPUS—BURDEN OF PROOF.**—Although the statute gives the relator the right to open and close the argument in a habeas corpus proceeding, it does not necessarily follow, nor follow at all, that the burden of proof is upon him. (*Ex parte Newman*, 740.)

HEIRS.

See Wills, 5.

HOMESTEAD.

1. **HOMESTEADS.—RIGHTS OF CREDITORS** as to property occupied by their debtor as his homestead, after filing a bill to cancel a previous satisfaction of their judgment to enjoin the sale of the property and subject it to such judgment, attach from the date of the decree and not from the time of the filing of the bill, if the court does not cancel the satisfaction of the judgment, but enters a money decree and directs execution to issue. (*Wike v. Garner*, 102.)

2. **HOMESTEADS—COTENANT'S RIGHT TO.**—An undivided interest in land, accompanied by the exclusive possession, management, and control in consideration of maintenance of his cotenant, is sufficient to support a right of homestead in the occupying cotenant. (*Wike v. Garner*, 102.)

3. **HOMESTEADS—HEAD OF FAMILY—WHO IS.**—A bachelor brother residing on premises with his two sisters, who are dependent upon him for support, is a householder having a family, of which he is the head and entitled to a homestead exemption. (*Wike v. Garner*, 102.)

4. **HOMESTEADS—OCCUPANCY WITHIN REASONABLE TIME.**—If a person buys a lot for a home, and erects a house thereon, a creditor cannot acquire a lien on the property, if, within a reasonable time, the purchaser moves on the property and occupies it as a homestead. (*Wike v. Garner*, 102.)

HOMICIDE.

1. **HOMICIDE—MURDER IN FIRST DEGREE.**—A deliberate and premeditated intention to kill, followed by the killing of a human being, completes the crime of murder in the first degree. (*People v. Kennedy*, 557.)

2. **HOMICIDE—SELF-DEFENSE.**—Before one can justify the taking of human life in self-defense he must show that there was reasonable ground for believing that he was in great peril, that the killing was necessary for his escape, and that no other safe means was open to him. When one believes himself about to be attacked by another, and to receive great bodily harm, it is his duty to avoid the attack, if in his power to do so; and the right of attack for the purpose of self-defense does not arise until he has done everything in his power to avoid its necessity. (*People v. Kennedy*, 557.)

3. **HOMICIDE—MURDER—SUFFICIENCY OF EVIDENCE.**—If the evidence shows that, after an encounter between the deceased and the defendant, the latter obtained a knife in a spirit of revenge, and, after being warned not to return, did return with intent to kill the deceased, and thereupon killed him, the jury is justified in finding that the killing was done with premeditation and deliberation, and that the defendant is guilty of murder in the first degree. (*People v. Kennedy*, 557.)

4. **HOMICIDE—MURDER—SUFFICIENCY OF PROOF.**—If the proof justifies a jury in finding that the homicide was intentional and resulted from sufficient deliberation and premeditation to warrant a verdict of murder in the first degree, the appellate court will not interfere with the determination upon the facts. (*People v. Kennedy*, 557.)

5. **HOMICIDE—MURDER—MOTIVE.**—Evidence showing that there had been a personal encounter between the deceased and the defendant, and that the latter, humiliated by his defeat and inspired by a spirit of revenge, returned to the place of the first affray and made a second attack, which was fatal, is sufficient to justify the jury in finding that the defendant had a motive for the commission of the crime. (*People v. Kennedy*, 557.)

6. **HOMICIDE—MURDER—REVIEW OF EVIDENCE.**—It is not within the province of the appellate court, in reviewing a judgment of death, to review or determine controverted questions of fact arising upon conflicting evidence. The jury is the ultimate tribunal in such cases, and with its decision the appellate court may not interfere, unless it reaches the conclusion that justice has not been done. (*People v. Kennedy*, 557.)

7. **HOMICIDE—DEFENSE OF INSANITY.**—Whether the insanity be general or partial, in order that it may excuse homicide, the degree of it must be so great as to have controlled the will of its subject and to have taken from him the freedom of moral action. (*Commonwealth v. Wireback*, 625.)

8. **HOMICIDE—DEFENSE OF INSANITY.—MERE MORAL OBLIQUITY OF PERCEPTION** does not constitute insanity excusing a person from punishment for his deliberate act, nor does a mere perversion of the moral sense, nor does an individual belief as to right and wrong, however sincere, constitute a delusion, or a phase of insanity, excusing homicide. (*Commonwealth v. Wireback*, 625.)

9. **HOMICIDE — DEFENSE OF INSANITY — SANITY PRESUMED.**—If the defendant in a prosecution for homicide was sane shortly before and shortly after the act of murder, the presumption is of sanity at the time of the act, which presumption could only be rebutted by showing some special frenzy or madness, connected with the act, which at the instant irresistibly impelled the defendant to commit it. (*Commonwealth v. Wireback*, 625.)

10. **HOMICIDE—DEFENSE OF INSANITY—REQUISITE DEGREE OF PROOF.**—If one accused of homicide alleges insanity as a defense, he must establish it by a preponderance of evidence, or the presumption of insanity which the law raises stands unshaken. The law recognizes no middle ground of doubt of sanity reducing murder otherwise in the first degree to murder in the second degree. (*Commonwealth v. Wireback*, 625.)

11. **HOMICIDE—EVIDENCE AS TO INSANITY—OPINION OF WITNESSES.**—The opinion of a witness as to the insanity of the defendant in a prosecution for homicide is inadmissible, no foundation therefor having been laid. But it is competent for witnesses who have stated their opportunities for observing defendant to testify whether or not they had noticed anything in his conduct or conversation indicating insanity. (*Commonwealth v. Wireback*, 625.)

12. **HOMICIDE—WIFE OF THE ACCUSED AS A WITNESS—EVIDENCE TO SUPPORT HER.**—If the defense to murder is insulting words and conduct by the deceased toward the wife of the accused which she communicated to him, and to which she has testified, it is error to exclude the testimony of witnesses to establish the fact that, before the homicide, she had stated to them the facts as testified to by her. Such testimony is admissible to support her, and to show that her husband believed her statements and committed the homicide in consequence thereof, when the theory and evidence on behalf of the prosecution is to the effect that her testimony was prompted by an improper motive and was recently fabricated solely to aid in the defense of the husband. (*Jones v. State*, 719.)

13. **HOMICIDE — WIFE AS WITNESS — CROSS-EXAMINATION.**—If, upon the trial of a husband on a criminal charge, his wife as a witness, on direct examination, should swear to facts injurious to him, he cannot complain, but her cross-examination must be confined to the matter elicited upon the examination in chief. Everything which is legitimate for the purpose of testing her knowledge of the facts sworn to, her bias or prejudice, or any matter that legitimately goes to discredit her, is admissible on cross-examination, but if the prosecution leaves the matter testified to on the examination in chief and proposes to prove independent criminative facts against the accused, this is not cross-examination, and the wife then becomes a witness for the prosecution. Her examination must then stop, because she cannot become a witness against her husband. (*Jones v. State*, 719.)

14. **HOMICIDE—EVIDENCE—STATEMENTS OF DECEASED—HEARSAY.**—If the defense to murder is insulting conduct by the deceased toward the wife of the accused, the testimony of a witness, that, subsequently to the alleged insulting conduct, he saw a woman in the office of the deceased, and that the latter informed him that she was the wife of the accused, is hearsay and inadmissible. (*Jones v. State*, 719.)

15. **HOMICIDE—MURDER—EVIDENCE OF REPUTATION OF DECEASED.**—If the defense to murder is insulting conduct of the deceased toward the wife of the accused, which she has communicated to him, the bad general reputation of the deceased, as well as his general reputation as a man of unchaste and lecherous habits toward women, is admissible in evidence upon the issue as to whether the accused believed the information received from his wife and acted thereon. (*Jones v. State*, 719.)

16. **HOMICIDE—EVIDENCE—RES GESTAE.**—If the defense to murder is insulting conduct by the deceased toward the wife of the accused, and she has testified as to such conduct and to communicating it to her husband, and that he and deceased were friendly until she made such communication, the prosecution cannot prove by her, as part of the *res gestae*, on cross-examination, matters relating to the disposition of her property, deceased's connection therewith, or the squandering of her property by her husband. (*Jones v. State*, 719.)

17. **MURDER—INSULTING CONDUCT TOWARD WIFE—EVIDENCE.**—If the defense to murder is insulting conduct by the deceased toward the wife of the accused, he may prove, as original evidence, that prior to the homicide his wife communicated a statement of the insulting conduct toward her to the witness, who in turn communicated it to the husband. (*Jones v. State*, 719.)

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—ASSAULT, IN WIFE'S ABSENCE, BY HUSBAND, WHO IS HER AGENT—WIFE'S LIABILITY.**—A married woman is civilly answerable for personal injuries inflicted, not in her presence, upon a third person, by her husband, while acting within the scope of his authority as her agent. (*Shane v. Lyons*, 261.)

2. **HUSBAND AND WIFE—UNITY OF, TO AID ENFORCEMENT OF COVENANT FOR WIFE'S BENEFIT.**—The common-law unity of husband and wife survives for the purpose of aiding the wife to enforce a covenant for her benefit made by her husband, and which equity and good conscience approve. (*Buchanan v. Tilden*, 454.)

3. **HUSBAND AND WIFE—PROMISE TO HIM FOR HER BENEFIT—WIFE'S RIGHT OF ACTION ON.**—If an heir-at-law and next of kin of one who died testate desires to contest a bequest, in the will, of a large amount of property, which, if invalid, would fall to the next of kin, but has no means to conduct the litigation, and obtains a loan of money, for the purpose, from a man whose wife has an equitable interest in the suit, by reason of her adoption by a relative of the testator, upon a promise to the husband that, in case of success, the contestant will pay to the wife the sum of fifty thousand dollars, the wife is entitled to recover on the contract, where the contestant succeeds in obtaining the fund for the next of kin, whether the mere relation of husband and wife would alone constitute a sufficient consideration to enable her to maintain the action, for her equities are such, when

considered in connection with the duty of her husband to provide for her future, and with the fact that, with that purpose in view, the money was procured for the contestant to institute and pursue the necessary litigation to secure the fund to which her equities related, that, all taken together, they are sufficient to sustain her action. (*Buchanan v. Tilden*, 454.)

4. HUSBAND AND WIFE—CONSIDERATION FOR COVENANT ON BEHALF OF WIFE.—It is not the full measure of the legal and moral obligations imposed upon a husband by the common law simply to provide for his wife the necessities of life, such as food, raiment and shelter, but it is his duty, if opportunity offers, to make provision for her against that day when he may be incapacitated by disease or removed by death; and this obligation is one that a court will recognize as a sufficient consideration to support a covenant on her behalf. (*Buchanan v. Tilden*, 454.)

5. HUSBAND AND WIFE—RIGHT OF PARENT TO ADVISE MARRIED CHILD.—In cases of unhappiness and disagreements between a married couple, the law recognizes the right of a parent to advise the son or daughter; and when such advice is given in good faith and results in a separation, the act does not give the injured party a right of action. (*Brown v. Brown*, 574.)

6. HUSBAND AND WIFE—PARENT AND CHILD—ADVICE TO CHILD—MALICE.—The malice necessary to be alleged and proved against a parent for advising his married child to abandon his wife or her husband, is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove to the satisfaction of the jury that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose, the law presuming malice from such conduct in actions of this nature. (*Brown v. Brown*, 574.)

7. HUSBAND AND WIFE—LIABILITY OF PARENT FOR ADVISING MARRIED CHILD TO ABANDON HUSBAND OR WIFE.—Before a parent can be held liable in damages for advising his married child to abandon his wife, or her husband, the conduct of the parent should be alleged and proved to be malicious. (*Brown v. Brown*, 574.)

8. HUSBAND AND WIFE—CONTROVERSY OVER FUNDS, THE WIFE'S SEPARATE ESTATE, TAKEN BY HER INSOLVENT HUSBAND—RIGHTS OF CREDITORS.—In a contest between the creditors of an insolvent husband and his wife over funds which, at one time, constituted her separate estate, but which she allowed to pass into her husband's hands, the creditors will prevail, where there is nothing to show that the transaction was intended as a loan, or that the husband and wife intended to occupy the relation of debtor and creditor in respect to such funds. (*New South B. & L. Assn. v. Reed*, 858.)

9. HUSBAND AND WIFE—IMPROVEMENTS PUT UPON THE WIFE'S SEPARATE REAL ESTATE BY HER INSOLVENT HUSBAND, in fraud of his creditors, can be followed by them on the premises where they are put, and the land may be charged, in their favor, with the value of such improvements. (*New South B. & L. Assn. v. Reed*, 858.)

See Witnesses, 12.

ILLEGITIMACY.

See Descent; Wills, 5.

INDICTMENT.

See Criminal Law, 15; Rape, 2.

INFANTS.

See Judgment, 11-14.

INJUNCTION.

INJUNCTIONS—WHEN NOT GRANTED.—If the facts present no matter requiring equitable relief, and the granting of an injunction will work irreparable injury to one party with no appreciable benefit to the other, and the remedy at law is adequate to do full justice, the court should refuse to issue an injunction as not within its legitimate jurisdiction. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

See Equity, 1; Trespass.

INNKEEPERS.

1. **INNKEEPERS—NEGLIGENCE—INJURY TO GUEST BY FIRE.**—No presumption of negligence on the part of an innkeeper arises where a guest loses his life in a fire originating in, and destroying the premises. To make the innkeeper liable in such a case it must be shown that his negligence was the proximate cause of the fire and the consequent injuries. (*Weeks v. McNulty*, 693.)

2. **INNKEEPERS—NEGLIGENCE IN FAILING TO PROVIDE FIRE-ESCAPES—MUNICIPAL ORDINANCE—EVIDENCE.**—In an action against an innkeeper, based upon his negligence in failing to provide his premises with fire-escapes, as required by city ordinance, resulting in the death of plaintiff's decedent, it is not error to exclude the violated ordinance from evidence where no causal connection between the violation of the ordinance and the injuries complained of is shown. (*Weeks v. McNulty*, 693.)

3. **INNKEEPERS—LIABILITY—GENERAL RULE.**—The general rule of law governing the liability of an innkeeper is, that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through the innkeeper's negligence. (*Weeks v. McNulty*, 693.)

INSANE PERSONS.

1. **INSANE PERSONS—ADMINISTRATION OF LUNATIC'S ESTATE—DISBURSEMENTS—NOTICE TO NEXT OF KIN.**—Before ordering disbursements from a lunatic's estate upon petition of the committee, notice should be given to the next of kin, or parties standing in close relation to the lunatic. (*Equitable Trust Co. v. Garis*, 644.)

2. **INSANE PERSONS—ADMINISTRATION OF ESTATES OF.** It is the duty of a court in administering the estate of an insane person to keep expenses within reasonable bounds, to sacrifice the estate only when all the circumstances of the case make it necessary, and to see to it that the future comfort of the lunatic shall be made as secure as possible. (*Equitable Trust Co. v. Garis*, 644.)

3. **INSANE PERSONS—POWERS OF COMMITTEE—EFFECT OF APPEAL FROM ORDER OF COMMITMENT.**—An appeal from an order of commitment entered in lunacy proceedings does not oust or suspend the committee of a lunatic from its functions, nor relieve it of the duty to guard the lunatic's property. Such com-

mittee may still sue in equity for the discovery and deliverance of property of the lunatic held by an unauthorized person. (*Equitable Trust Co. v. Garis*, 644.)

4. **INSANITY—OPINIONS OF NONEXPERTS.**—Intimate acquaintances of a person whose sanity is the subject of investigation and who have been close observers of his conduct, though not competent as experts, when they can instance acts indicating mental derangement, are competent to give their opinions as to the sanity or insanity of such person. (*In re Christensen*, 794.)

See Equity, 1, 3; Homicide, 7-11; Witnesses, 10.

INSOLVENCY.

1. **INSOLVENCY—CREDITOR—COLLATERAL SECURITY.**—The rule that a creditor of an insolvent, having collateral sufficient to satisfy a part only of his debt, is entitled to prove the whole of his claim, and cannot be required to allow credit for any collections made after the date of the insolvency, does not apply where the insolvent's liability is that of indorser upon negotiable notes, which it discounted to a third party, his liability becoming fixed subsequent to the insolvency, and where there is no indebtedness independent of the notes. (*Mercantile Nat. Bank v. Macfarlane*, 352.)

2. **SUBROGATION—INSOLVENCY—RIGHT OF ACTION OF RECEIVER.**—The receiver of an insolvent indorser has a right of action against the original obligors upon the paper, upon the payment of a dividend to the creditor holder; and upon full payment, the estate of the insolvent is subrogated to all of the creditors' rights as against prior parties. (*Mercantile Nat. Bank v. Macfarlane*, 352.)

3. **INSOLVENCY—ATTACHMENT—EFFECT ON RIGHTS OF CREDITOR.**—A proceeding in attachment, unnecessary to protect the creditor as to money of an insolvent debtor in the creditor's hands, will not affect the creditor's right to prove the balance of his claim, and to share in the distribution of the insolvent's estate. (*Mercantile Nat. Bank v. Macfarlane*, 352.)

4. **INSOLVENCY—NEGOTIABLE INSTRUMENTS—RIGHTS OF HOLDER AGAINST INSOLVENT INDORSER.**—The holder of a note or bill indorsed by an insolvent need not enforce its collection, as against parties primarily liable, before he can make a claim upon the insolvent estate. Nor is he required to surrender up the obligation as a condition to participating in dividends. In the absence of statute he may proceed against the insolvent estate, and also against the other parties to the obligation, until his debt is fully collected. (*Mercantile Nat. Bank v. Macfarlane*, 352.)

5. **INSOLVENCY—NEGOTIABLE INSTRUMENTS—CLAIM OF HOLDER AGAINST INSOLVENT INDORSER.**—Where the holder of a bill or note applies to prove his debt against the estate of an insolvent surety, any sum actually received in payment from another party to the obligation must be deducted from the amount to be proved. The sum actually remaining unpaid must be the basis upon which the dividend is to be computed. (*Mercantile Nat. Bank v. Macfarlane*, 352.)

See Building and Loan Associations, 2, 4; Corporations, 2, 10-12, 30; Husband and Wife, 8, 9.

INSTRUCTIONS.

1. INSTRUCTIONS—IMMATERIAL ERROR.—Erroneous instructions as to the interpretation to be given a doubtful telegram, when without prejudice, are not ground for reversal. (*Hasbrouck v. Western Union T. Co.*, 181.)

2. INSTRUCTIONS—ERRONEOUS SUBMISSION TO JURY OF MATTER OF LAW.—It is harmless error for the court to submit to the jury the question of interpretation of a telegram conferring certain authority upon an agent, when, from the verdict rendered, it is apparent that the interpretation adopted by the jury gave to the telegram the meaning which, as a matter of law, was proper. (*Hasbrouck v. Western U. T. Co.*, 181.)

3. INSTRUCTIONS—REVIEW ON APPEAL.—In determining whether an instruction given in a trial for homicide was erroneous and prejudicial, it should be considered not only with what precedes and follows it, but in view of the idea being elucidated. (*Commonwealth v. Wireback*, 625.)

See Appeal, 2, 10, 12; Trial, 1, 5; Witnesses, 6.

INSURANCE.

1. INSURANCE COMPANIES—ULTRA VIRES—POLICY FORBIDDEN BY STATUTE.—Where a mutual insurance company issues a policy which it is prohibited by law to issue, the policy is illegal and void, and the fact that premiums have been paid thereon, and used by the company, will not estop it from pleading ultra vires as a defense to a suit upon the policy. (*In re Assignment Mut. Guar. Ins. Co.*, 149.)

2. INSURANCE COMPANIES—POWERS—ASSURED MUST TAKE NOTICE OF.—One who takes out a policy in a mutual insurance company which the latter has no power under its charter to make must take notice of the laws of the state and the articles of incorporation adopted thereunder, and cannot recover upon the policy unless enabled to do so upon the ground of estoppel. (*In re Assignment Mut. Guar. Co.*, 149.)

3. INSURANCE COMPANIES—MUTUAL—WHO ARE NOT MEMBERS.—One who insures his property in a mutual company in a stated amount, for a specific premium does not become a member of the company so as to be liable for future assessments. (*In re Assignment Mut. Guar. Ins. Co.*, 149.)

4. INSURANCE COMPANIES—MUTUAL—WHEN DO NOT BECOME STOCK COMPANIES.—A mutual insurance company organized under a statute authorizing an association of persons making mutual pledges and giving valid obligations to each other for their own insurance on the assessment plan, does not become a stock company by the issuance of shares to the subscribers of a guaranty fund, which shares are secured by obligations of the holders, and are subject to assessment from time to time to meet any deficiency that might arise in the advancements, assessments, and pledges made to pay losses and expenses. Therefore it cannot do business on the stock plan, cannot write a policy for a fixed amount, accept premiums as such, nor declare dividends. (*In re Assignment Mut. Guar. Ins. Co.*, 149.)

5. INSURANCE COMPANIES—MUTUAL—LIABILITY OF MEMBERS TO A PERSON ILLEGALLY INSURED.—While the officers or directors of a mutual insurance company may be held individually liable for a wrong done to a person to whom they have issued an illegal and void policy, no liability for such wrong can

be enforced against the members of the company as partners. (In re Assignment Mut. Guar. Ins. Co., 149.)

6. **INSURANCE—ACCIDENT—DEATH BY—RUPTURE OF ARTERY.**—Where the death of an insured was due to the rupture of an artery it will not be considered as the result of accident where in the circumstances attending the rupture, there is no evidence that anything was done or occurred which the insured had not foreseen or planned, except the rupture and its consequences. (*Feder v. Iowa State etc. Assn.*, 212.)

7. **INSURANCE—ACCIDENT—WHAT IS.**—While it may be true that an accident is an event which takes place without one's foresight or expectation, and is undesigned, it is not true that every unforeseen, undesigned, and unexpected event is an accident. A result which, though not designed, foreseen, or expected, is yet the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, cannot be said to be accidental. (*Feder v. Iowa State etc. Assn.*, 212.)

8. **INSURANCE, LIFE—POLICY OF, MAY BE ASSIGNED TO ONE HAVING NO INSURABLE INTEREST.**—A valid policy of life insurance is assignable. Hence, if a policy is, in good faith and not for the purpose of assignment, taken out, either by the insured himself, or by another, who has an insurable interest in his life, it may be lawfully assigned to one who has no insurable interest in the life of the insured, and the assignee may, therefore, enforce collection of the full amount of the policy from the company, where the assignment is general and absolute. (*Steinback v. Diepenbrock*, 424.)

9. **INSURANCE, LIFE—CONTRACT OF, AND ITS ASSIGNMENT—CONSTRUCTION—INTENTION—WAGERING POLICY.** The intention of the parties procuring a life insurance determines its character. Hence, if one should take out such a policy to himself, and at once assign it to a person having no insurable interest in his life, the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction, for the purpose of frustrating a wagering policy. (*Steinback v. Diepenbrock*, 424.)

10. **INSURANCE, LIFE—POLICY OF—RIGHT TO ASSIGN—FAILURE OF HEALTH.**—A person whose life is insured is not deprived of the right to realize on his policy, by its assignment, whenever his necessities press him, because of a failing condition of health. (*Steinback v. Diepenbrock*, 424.)

11. **INSURANCE—POSSESSION OF POLICY.**—Possession of an insurance policy, at the death of the insured, makes out a *prima facie* case. (*Kendrick v. Life Ins. Co.*, 592.)

12. **INSURANCE—PAYMENT OF PREMIUM—RECITALS IN THE POLICY—ESTOPPEL.**—The acknowledgment in the policy of the receipt of the premium estops the company to test the validity of the policy on the ground of nonpayment of the premium. (*Kendrick v. Life Ins. Co.*, 592.)

13. **INSURANCE—RECITALS OF PAYMENT IN THE POLICY—WHEN A MERE RECEIPT.**—In so far as a recital in an insurance policy of the payment of premium is a mere receipt for money, it is only *prima facie* like other receipts, and will not prevent an action to recover the money if not in truth paid. (*Kendrick v. Life Ins. Co.*, 592.)

14. **INSURANCE—RECITALS OF PAYMENT IN THE POLICY—WHEN PART OF CONTRACT.**—In so far as a recital in an insurance policy of the payment of premium is a part of the con-

tract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy. (*Kendrick v. Life Ins. Co.*, 592.)

15. **INSURANCE—INSTRUCTIONS TO AGENTS—EVIDENCE AGAINST THE COMPANY.**—The instruction to agents that if the premium was paid more than thirty days after due there must be a health certificate is evidence against the company that credit or indulgence on payment was allowable. (*Kendrick v. Life Ins. Co.*, 592.)

16. **INSURANCE—INSTRUCTIONS TO AGENTS NOT BINDING ON THE INSURED.**—The instruction to agents that after thirty days' delay in the payment of premium a health certificate is required is not binding on the insured, who may rely upon the provision in the policy itself that the payment must be made "during life." (*Kendrick v. Life Ins. Co.*, 592.)

17. **INSURANCE—CONSTRUCTION OF POLICY.**—The uniform rule of construction of insurance policies is, that if reasonably susceptible of two constructions, that one will be adopted which is more favorable to the insured. (*Kendrick v. Life Ins. Co.*, 592.)

18. **INSURANCE—LIFE—INCONTESTABILITY.**—Where a policy of life insurance provides that after one year from its inception it shall be incontestable if the premiums are paid, such policy cannot be contested by the insurer, after a year has elapsed, on the ground of fraud in obtaining the policy, and it makes no difference whether suit is brought upon the policy by the assured's representatives or any bona fide assignee of the assured. (*Clement v. Insurance Co.*, 650.)

19. **INSURANCE—LIFE—INCONTESTABLE CLAUSE—WAGERING TRANSFER.**—An incontestable clause in a policy of life insurance cannot be relied upon to aid a transferee thereof who, by means of an unauthorized and illegal transfer, commenced before, and consummated after, the policy issued, to recover thereon. Such clause does not preclude inquiry into the transfer and the right of the transferee to take under the policy, and if the transfer is a wagering transfer the transferee cannot recover. (*Clement v. Insurance Co.*, 650.)

20. **INSURANCE—LIFE—PAYMENT OF PREMIUMS TO AGENT—PROOF.**—Where a policy of life insurance provides that premiums thereon may be paid to an agent producing a receipt therefor signed by the president or other named officers of the company, the payment of premiums is sufficiently established in a suit on the policy, by evidence that they were paid to one held out as a general agent of the company who delivered a receipt signed by the president when the payment was made. (*Clement v. Insurance Co.*, 650.)

21. **INSURANCE—LIFE—INSURABLE INTEREST—WAGERING POLICY.**—One who takes out a policy upon the life of another paying the premiums therefor himself must have an insurable interest in the life of that other, or the policy will be a mere wager policy upon which the party to whom it was issued cannot recover. (*Clement v. Insurance Co.*, 650.)

22. **INSURANCE—LIFE—INCONTESTABILITY—FRAUD OF ASSIGNEE.**—Where a policy of life insurance provides that it shall be incontestable by the company after one year if the premiums are paid, and suit is brought thereon by a transferee of the policy, after the lapse of such time, the premiums being paid, the insurer may, nevertheless, defend upon the ground that the plaintiff is not a transferee in good faith, and that the transfer was a

mere evasion of the rule against wagering policies, and evidence in support of such defense is admissible. (*Clement v. Insurance Co.*, 650.)

23. **INSURANCE—LIFE—ASSIGNMENT—INSURABLE INTEREST.**—When a policy of life insurance has once been issued to a beneficiary legally entitled, he may assign or transfer it to another who has no insurable interest, the transfer or assignment must be in good faith, and not a mere colorable evasion of the provision in regard to wagering contracts and in order to validate or legalize the same. (*Clement v. Insurance Co.*, 650.)

INTERSTATE COMMERCE.

1. **INTERSTATE COMMERCE—JURISDICTION OF STATE AND FEDERAL COURTS—CONNECTING RAILROADS.**—Where the putting in of a connecting switch at the intersection of two railroads for the purpose of transferring cars from one road to the other, is of some benefit both to interstate and state traffic, the state and the federal courts have concurrent jurisdiction in the matter, and, in disposing of the case, they may take into consideration the whole necessity resulting from the whole benefit which will accrue to all classes of commerce. (*Jacobson v. Wisconsin etc. R. R. Co.*, 358.)

2. **INTERSTATE COMMERCE—STATE REGULATIONS—SILENCE OF CONGRESS.**—The rule that the silence of congress in relation to articles confessedly suited for commerce is to be taken as legally equivalent to its declaration that the transportation of those articles into the states shall be free and unrestricted, has no application to articles of doubtful commercial quality. (*Austin v. State*, 703.)

3. **INTERSTATE COMMERCE—ORIGINAL PACKAGE—BASKET CONTAINING CIGARETTE PACKAGES.**—Where a number of packages of cigarettes containing ten cigarettes each are shipped from one state to another in a basket, the basket is an original package within the interstate commerce act. The presence or absence of covering to the basket is immaterial to the question whether or not the basket is an original package, and it is of no importance that the basket is owned by the transporting carrier. (*Austin v. State*, 703.)

4. **INTERSTATE COMMERCE—ORIGINAL PACKAGE—DEFINITION.**—An original package, as applied to interstate or international commerce, is a package, bundle, or aggregation of goods, put up in whatever form, covering, or receptable for transportation, and as a unit transported from one state or nation to another. (*Austin v. State*, 703.)

5. **INTERSTATE COMMERCE—STATE REGULATION—CONSTITUTIONALITY—BURDEN OF PROOF.**—The burden is upon a person who assails a state's restrictive or prohibitory statute as an unwarranted interference with interstate commerce, to show that the particular article involved is a legitimate subject of commerce. (*Austin v. State*, 703.)

6. **INTERSTATE COMMERCE—REGULATION BY STATES—CIGARETTES.**—Cigarettes are not legitimate articles of commerce, and, in the absence of congressional regulation to the contrary, a state statute may prohibit the importation and sale of cigarettes within the state. Such a statute is not in contravention of that clause of the federal constitution which inhibits state regulation of interstate commerce. (*Austin v. State*, 703.)

7. INTERSTATE COMMERCE—LEGITIMATE COMMODITIES—CONGRESSIONAL TAXATION OF CIGARETTES.—Congress, by imposing a revenue tax upon cigarettes, does not recognize them as proper commercial commodities. (*Austin v. State*, 703.)

Set Police Power, 8.

INTERVENTION.

INTERVENTION IN EQUITY.—One who intervenes in a suit in equity, and prays for relief, both legal and equitable, is bound to admit and provide for all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of, or necessarily involved in, the subject matter of the controversy. (*Charleston etc. Ry. Co. v. Hughes*, 17.)

INTOXICATING LIQUORS.

See Constitutions; Police Power, 5, 7; Social Clubs.

JOINT STOCK COMPANIES.

1. JOINT STOCK COMPANIES—SUBSCRIPTION TO STOCK INDUCED BY FRAUD—REMEDY OF SUBSCRIBER IN ABSENCE OF RIGHT OF RESCISSION.—If a person has been induced by the fraudulent representations of an agent of a joint stock company to take shares therein, and the shareholder is debarred from a rescission of his contract by the insolvency of the company, or from any other cause, he is without remedy against the company, and is left to his action against the agent who so induced him to subscribe. (*Wilson v. Hundley*, 837.)

2. JOINT STOCK COMPANIES—SUBSCRIPTION TO STOCK INDUCED BY FRAUD—ACTION FOR DAMAGES—INAPPLICABILITY OF GENERAL RULE.—The general rule that a person who has been induced by fraud to enter into a contract pertaining to goods and chattels may, upon the discovery of the fraud, elect to retain what he has received and bring an action to recover any damages he has sustained by reason of the fraud, does not apply to subscriptions for stock in a joint stock company, for such an action is at variance with the contract entered into by the subscriber. (*Wilson v. Hundley*, 837.)

3. JOINT STOCK COMPANIES—SUBSCRIPTION TO STOCK—NATURE OF, THOUGH INDUCED BY FRAUD—ACTION FOR DAMAGES.—A subscription to the capital stock of a joint stock company is not only an undertaking to the company, but with all other subscribers, and it is of the essence of the contract between the shareholders that they shall all contribute ratably to the payment of the company's debts and liabilities. Hence, a shareholder who was induced by the fraudulent representations of an agent of the company to take shares in it, cannot, after he discovers the fraud, elect to retain the shares and sue the company for damages, as this would throw the burden of the payment of the debts and liabilities on the other shareholders, who are as innocent of the fraud as he is. (*Wilson v. Hundley*, 837.)

JUDGMENT.

1. JUDGMENTS—LIEN OF—VENDOR AND VENDEE—APPLICATION OF PAYMENTS.—The mere docketing of a judgment against the vendor of land is not notice of the lien to a purchaser in possession under a contract of sale, and payments subsequently made by him to the judgment debtor, pursuant to the contract,

without actual notice of the judgment, are valid as against its lien upon the land. (Wehn v. Fall, 397.)

2. JUDGMENTS—LIEN OF—VENDOR AND VENDEE—APPLICATION OF PAYMENTS.—A judgment against a vendor of land, who retains the legal title under a contract of sale, attaches as a lien to such land, and, as against the vendee in possession with actual notice, may be enforced to the extent of the unpaid purchase money. (Wehn v. Fall, 397.)

3. JUDGMENTS—RELIEF IN EQUITY.—If a judgment is based upon perjured evidence of a successful party given at the trial, while the defeated party has a good defense which he was prevented from presenting by reason of such perjury, and without being guilty of negligence has exhausted all his ordinary legal remedies for vacating such judgment, equity, in a proper proceeding, may vacate the judgment and grant the defeated party a new trial. (Munro v. Callahan, 366.)

4. JUDGMENTS—RELIEF IN EQUITY—PERJURY—MISTAKE.—A court of equity cannot vacate a judgment on account of any innocent mistake or want of recollection on the part of the successful party or his witnesses, nor even on account of the perjury of other witnesses in the case. (Munro v. Callahan, 366.)

5. JUDGMENTS—RELIEF IN EQUITY—FRAUD.—A court of equity cannot vacate a judgment after the term at which it was rendered, and grant the defeated party a new trial for fraud practiced upon him, except when such fraud was practiced in connection with the trial. (Munro v. Callahan, 366.)

6. JUDGMENTS OF SISTER STATE—ACTION UPON—PRESUMPTIONS.—In an action upon a judgment of a sister state, entered upon a warrant of attorney to confess judgment, the presumption is, that the court had jurisdiction to enter it, and that the proceedings were regular and according to the laws of that state. (Van Norman v. Gordon, 304.)

7. JUDGMENT CONFESSED UNDER WARRANT OF ATTORNEY—ILLUSTRATION—"FAITH AND CREDIT" IN ANOTHER STATE.—If a person signs a promissory note, executing, at the same time, a warrant of attorney to confess judgment, and a judgment of a court of record in an action upon the note is entered, under such warrant by the confession of an attorney of such court, who was requested to appear by the attorney named in the warrant, such judgment is entitled to full faith and credit in another state, if an action is brought upon it, though such appearance in the former state was really in the plaintiff's interest, where there is no charge of fraud, no appearance of irregularity, and what was done in confessing judgment came within the terms of the warrant of attorney. (Van Norman v. Gordon, 304.)

8. JUDGMENT, THOUGH CONFESSED UNDER WARRANT OF ATTORNEY, IS ENTITLED TO "FAITH AND CREDIT" IN ANOTHER STATE.—A judgment of a court of one state is entitled to full faith and credit in other states where the court which rendered it had jurisdiction to render such a judgment. If it had, then the fact that it is a judgment by confession, under a warrant of attorney, is immaterial. Such judgments, when rendered by courts having jurisdiction of the cause and the parties, have all the qualities, incidents, and attributes of other judgments. (Van Norman v. Gordon, 304.)

9. JUDGMENTS—SETOFF OF.—A judgment, to be available as a setoff, must be a valid subsisting obligation, final in its nature. Hence, judgments cannot be set off against each other where one of

them has been appealed from and the appeal is still pending and undetermined. (*De Camp v. Thomson*, 570.)

10. JUDGMENTS—JUDICIAL DETERMINATIONS—COLLATERAL ATTACK.—A judicial determination may be contrary to conclusive evidence, or legal evidence, or without any evidence, yet cannot collaterally be impeached for want of jurisdiction. (*Parsons v. Parsons*, 894.)

11. JUDGMENTS AGAINST INFANTS.—If infant defendants in a case have been regularly summoned, the failure to appoint a guardian ad litem is error only, and does not render void the judgment entered. (*Manfull v. Graham*, 412.)

12. JUDGMENTS AGAINST INFANTS—VACATING.—Under a statute providing that "it shall not be necessary to reserve in a judgment or order, the right of an infant to show cause against it after his attaining full age, but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such judgment," the infant does not, on his arriving at majority, have an absolute right to have the judgment set aside, but only to show cause against it, and does not extend that right beyond the cases mentioned, and under such statute an infant is not entitled to a day in court after reaching his majority to show cause against a judgment ordering a sale of his lands. (*Manfull v. Graham*, 412.)

13. JUDGMENTS AGAINST INFANTS—VACATING.—An original action to vacate an erroneous judgment against an infant cannot be maintained without showing a good defense to the first action and judgment. (*Manfull v. Graham*, 412.)

14. JUDGMENTS AGAINST INFANTS—VACATING.—Under section 602 of the code of Nebraska, an infant, against whom an erroneous judgment has been entered, may have it set aside, provided his disability does not appear in the record nor the error in the proceedings, but, if these facts appear, his remedy is by writ of error. (*Manfull v. Graham*, 412.)

15. JUDGMENTS RENDERED DURING TERM HAVE EFFECT FROM FIRST DAY THEREOF—PRIORITY OF LIEN.—A judgment rendered during a term of court relates back to the first day thereof, and is a lien upon the real estate of the judgment debtor from that time. It is, therefore, a lien which has priority over a deed of trust recorded during the term, though the judgment was actually rendered after the deed of trust was recorded. (*New South B. & L. Assn. v. Reed*, 858.)

16. JUDGMENTS—WHEN MAY BE VALIDATED.—If a court has jurisdiction of the subject matter of the suit and of the person, and some essential step is omitted which the legislature has the right to dispense with, it may validate the judgment or decree, notwithstanding the omission or irregularity. (*In re Christensen*, 794.)

17. JUDGMENTS—JURISDICTION.—If a statute purporting to confer jurisdiction is void, no intentment of law or presumption of fact can be made in favor of the jurisdiction. (*In re Christensen*, 794.)

18. JUDGMENTS—WHEN VOID—COLLATERAL ATTACK.—A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question. (*In re Christensen*, 794.)

19. JUDGMENTS—VOID CANNOT BE VALIDATED.—A judgment or decree which is absolutely void cannot be validated or confirmed by subsequent legislation. (In re Christensen, 794.)

20. JUDGMENTS.—ESTOPPEL CANNOT BE BASED on a void judgment or decree. (In re Christensen, 794.)

21. JUDGMENTS AS ESTOPPEL.—If the court has jurisdiction of the subject matter of the suit and of the parties, and the decree or judgment may be reversed or set aside for error or irregularity, and the defendant waives his right to have this done by executing or accepting it, he is estopped from denying its binding effect, but, if such judgment is void for any reason, he is not estopped. (In re Christensen, 794.)

See Adoption, 2; Attachment, 3; Habeas Corpus, 3.

JUDICIAL NOTICE.

See Evidence, 9.

JUDICIAL SALES.

1. JUDICIAL SALES—TITLE OF PURCHASER.—The title of a stranger derived through sale under judgment is not subject to defeat by the subsequent vacation of such judgment. (Manfull v. Graham, 412.)

2. JUDICIAL SALES—"UPSET" BIDS—WHEN PROPERLY REJECTED—CONFIRMATION.—When a farm, composed of fertile bottom lands and poor uplands, is about to be sold at a judicial sale, and is laid off into parcels, so that one who buys a parcel of the lowland is thereby induced and willing to buy upland which can be used advantageously with it, the court, after the sale, will reject an "upset" bid made at a small advance on only a part of a purchase, where the effect of accepting it would be to cause the purchaser of two parcels to lose one of them, and without which he would not want the other, particularly if the terms of the "upset" bid preclude a resale of the tract in the manner as before. (Moore v. Triplett, 882.)

3. JUDICIAL SALES—HOW COURT SHOULD ACT UPON REPORT.—A court should so act upon a report of a sale of property made under its order as not to deter or discourage bidders. It should so act as to induce possible purchasers to attend such sales, to encourage fair, open, and competitive bidding in order that the highest possible price may be obtained, and to inspire confidence in the stability of judicial sales. This is due not merely to the purchaser, but also to creditors, debtors, and the owners of property which has to be sold by the court. (Moore v. Triplett, 882.)

4. JUDICIAL SALES—"UPSET" BIDS—WHO CANNOT MAKE.—One who was a bidder at a judicial sale, by himself or by an agent, or who was present and had the opportunity to bid, will not, as a general rule, be permitted to put in an "upset" bid. He should have bidden at the sale, in open competition with all others, what he was willing to give for the property. (Moore v. Triplett, 882.)

5. JUDICIAL SALES—"UPSET" BIDS—REJECTION OF—DISCRETION.—If land is sold under the order of a court, and an "upset" bid is made thereon, the court must exercise a sound legal discretion as to whether it will accept it or not. A bid for ten per cent, advance, well secured, and put in before confirmation, is as much a valid bid as if made at the auction, but the court is not always bound to accept it, without regard to the circumstances of the case. (Moore v. Triplett, 882.)

6. JUDICIAL SALES—"UPSET" BIDS—ACCEPTANCE OF.—A court must sell property at the best price obtainable. Hence, a substantial and well secured "upset" bid should be accepted, unless there are circumstances going to show that injustice would be done to the purchaser or other person. (*Moore v. Triplett*, 882.)

7. JUDICIAL SALES—CONFIRMATION—DISCRETION.—A court, in determining whether or not it will confirm a judicial sale, must, under the circumstances of the particular case, exercise a sound legal discretion with a view to fairness, prudence, and a just regard to the rights of all concerned. (*Moore v. Triplett*, 882.)

8. JUDICIAL SALES—RIGHT OF COURT TO KNOW ALL THE FACTS—DUTY OF COMMISSIONER.—A commissioner who makes a judicial sale is the agent of the court, and should report his information of facts, particularly as to the buying of bids before confirmation, to the court, as the court has a right to know all that he knows about the matter, to the end that the sale may not be confirmed unless it is proper to do so. (*Camp v. Bruce*, 873.)

9. JUDICIAL SALES—SALE OF BID AT AN ADVANCE—CONFIRMATION.—A court will never, where the facts are known to it, confirm a judicial sale, if the bidder has sold his bid at an advance, unless the advance paid, or to be paid, inures to the benefit of the parties to the suit. (*Camp v. Bruce*, 873.)

See Attachment, 4; Contract, 10, 11; Devise, 3-6; Execution.

JURISDICTION.

1. JURISDICTION—COURTS OF CONCURRENT—WHICH ACQUIRES PRECEDENCE.—In case of a conflict of jurisdiction between two courts having concurrent jurisdiction, that court which first acquires cognizance of the controversy, or obtains possession of the property in dispute, is entitled to retain it until the end of the litigation, and should decide all questions which legitimately flow out of the controversy. (*Spiller v. Wells*, 878.)

2. JURISDICTION—HOW ACQUIRED—CONCURRENT JURISDICTION—PRIORITY—SERVICE OF PROCESS.—Jurisdiction is acquired by the issue and service of process, and, in case of conflict between courts of concurrent jurisdiction, the date of service of the process determines the priority of the jurisdiction; but it is an essential condition in the application of this rule that the first suit shall afford the plaintiff in the second an adequate and complete opportunity for the adjudication of his rights. (*Spiller v. Wells*, 878.)

See Attachment, 5-8; Courts; Criminal Law, 4; Devise, 3, 4, 6; Equity, 2-7; Interstate Commerce, 2; Judgment, 17; Marriage and Divorce, 6; Mechanic's Lien, 7.

JURY.

See Trial, 2.

LACHES.

See Mortgages, 1, 2, 4, 6.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—DEFECTIVE PREMISES—LANDLORD'S LIABILITY TO TENANT'S GUESTS.—If a landlord maintains outside steps and a platform for the use in common of tenants of different parts of the building, and a visitor to one

of the tenants, expressly invited by the tenant to come on a particular day for a particular purpose, is injured by a defect in the platform while passing over it, the landlord is answerable, for the visitor was using the platform in the tenant's right. (*Coupe v. Platt*, 293.)

2. LANDLORD AND TENANT—HOLDING OVER—WHAT NECESSARY TO CONSTITUTE.—A holding over by a tenant after the expiration of his lease for a year, so as to render him liable for another year's rent, must be by such voluntary act that the law implies a contract on his part, or leasing of the premises for another year. Such implication does not arise from his act due to any stress of circumstances which involves peril to his life, or that of some member of his family. (*Herter v. Mullen*, 517.)

3. LANDLORD AND TENANT—HOLDING OVER—OMISSION TO SURRENDER PREMISES, WHAT EXCUSES.—The failure of the tenant to surrender the premises upon the expiration of his term is excused when rendered impossible by act of God, unavoidable accident, or stress of circumstances imperiling his life, or that of some member of his family, so far as his liability to pay rent for another term is involved by his holding over under such circumstances. (*Herter v. Mullen*, 517.)

4. LANDLORD AND TENANT—HOLDING OVER—RETENTION OF POSSESSION CAUSED BY SICKNESS.—If a tenant by the year, intending to surrender the premises at the end of his term, is obliged to retain a room in the leased house for a short period of time after his lease expires in order to avoid the peril of exposing a sick member of his family to danger or death, this is not a holding over within the meaning of the rule that if the tenant holds over the landlord may continue the lease and recover rent for another year. (*Herter v. Mullen*, 517.)

5. LANDLORD AND TENANT—DANGEROUS CONDITION OF LEASED PREMISES—LIABILITY OF LANDLORD.—The lessor of premises containing an elevator which is dangerous, owing to a secret mechanical defect, known to the lessor, but not discoverable by the lessee in the exercise of reasonable care, is liable to employes of the lessee for injuries received in operating the elevator and resulting from such secret defect. (*Anderson v. Hayes*, 930.)

LARCENY.

LARCENY.—HOUSE—WHAT IS.—A structure eight feet high, stationary, inclosed with wire and covered with shingles, and, maintained for the safekeeping of birds and fowls, is a house within the meaning of a statute defining larceny from a house or any building. (*Williams v. State*, 82.)

LEGACY.

See *Devise*, 7.

LEGISLATURE.

LEGISLATURE—POWER TO TAX—LIMITATION.—The legislative power of taxation is subject to the qualification that it must not be exercised to impair the obligation of contracts. (*Broadfoot v. Fayetteville*, 610.)

See *Eminent Domain*, 8; *Judgment*, 16; *Municipal Corporations*, 16; *Police Power*, 4, 7; *Railroad Companies*, 8, 9; *Statutes*, 7.

LIBEL.

1. **LIBEL OF A CLASS.**—A publication charging the street-car conductors of a certain city with being pimps, and that they would sell the virtue of their sisters for a drink, is libelous per se. (*Jones v. State*, 751.)

2. **LIBEL.—RECOGNIZANCE ON APPEAL** which recites that the defendant “stands charged with the offense of libel,” is sufficient. (*Jones v. State*, 751.)

3. **LIBEL OF A CLASS.**—It is a violation of the Texas statute to libel any sect, company, or class of persons without naming any person in particular who may belong to such class. (*Jones v. State*, 751.)

LIENS.

1. **LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—PREJUDICIAL ACT WITH NOTICE OF EQUITIES.**—When a person buys part of a tract of land, with full notice or knowledge of a deed of trust on the whole of it, he must, in order to prevent the land so purchased from being subjected to the payment of such lien, show that the holder thereof has, with notice of his equities, done some act to his prejudice. (*Lynchburg Perpetual etc. Co. v. Fellers*, 851.)

2. **LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—ORDER OF—RELEASE OF PRIMARY SECURITY—EFFECT OF.**—If a person executes a trust deed to a loan company on the whole of certain land to secure a loan, and then sells part of the property to a church, which assumes the payment of the loan, but subsequently sells other portions of the land, at different times, to two other persons, and then rescinds the contract by which the trustees of the church assumed to pay the trust debt, after which the loan company, with notice of the last purchasers' interest in the property embraced in the trust deed, but without notice of such rescission, releases the church property from the lien of the trust deed, the property last purchased is not absolutely released from the lien of the trust deed, but only discharged from an amount of the trust deed debt equal to the value of the parcel released so far as the proceeds of that parcel have not been applied to the payment of the lien; because the injury done to the last purchaser by the release was the difference between the value of the property released and what was actually paid out of its proceeds, or on account of it, upon the lien. That part of the land still owned by the grantor should be first subjected to the payment of the loan company's debt, and, if the proceeds of the last purchaser's lot is not sufficient to satisfy that portion of the loan company's debt chargeable upon it, the next preceding lot, in order of alienation, is liable, and this lot will also be chargeable with that portion of the loan company's debt from which the last purchaser's lot was discharged by the release of the church lot from the lien of the deed of trust. (*Lynchburg Perpetual etc. Co. v. Fellers*, 851.)

3. **LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—RELEASE OF PRIMARY SECURITY—GENERAL RULE—EXCEPTION.**—Ordinarily, when the equities of the various owners of lands subject to a deed of trust are unequal, so that their respective parcels are liable, in the inverse order of their alienation, if the deed of trust creditor, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases those parcels

which are subsequently liable, in the order of their several liabilities, from an amount of the deed of trust debt equal to the value of the parcel released; but this effect of the release may be obliterated by the conduct of the parties to be affected. Thus, if a whole tract of land is covered by a trust deed to secure a debt, and the trust deed creditor releases the trust deed lien, without notice of the rights and interests of one who had purchased a parcel of the land subject to the deed of trust, such purchaser cannot claim the benefit of the general rule where he had notice of all the facts constituting the release. (*Lynchburg Perpetual etc. Co. v. Fellers*, 851.)

4. LIENS—TRUST DEED—SUBSEQUENT PURCHASER—SUBJECTING LANDS TO PAYMENT OF LIEN—ASSUMPTION OF TRUST DEBT—RESCISSION—BURDEN OF PROOF.—If one executes to a loan company a deed of trust on the whole of certain land to secure a loan, and then sells part of the property to a church, which assumes the payment of the loan, one who subsequently buys another portion of the land must, if he would prevent it from being subjected to the lien of the trust deed, on the ground that the contract to assume the payment of the trust debt has been rescinded, assume the burden of proving that the loan company assented to the rescission of the contract. (*Lynchburg Perpetual etc. Co. v. Fellers*, 851.)

See Corporations, 11, 21, 22; Judgment, 1, 2, 15; Marriage and Divorce, 4.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS OF ACTIONS.—PART PAYMENT OF A DEBT, in order to take a case out of the statute, must be made voluntarily by the debtor sought to be charged with the effect of it, or by some one authorized by him to make a new promise on his behalf. (*Wolford v. Cook*, 315.)

2. LIMITATIONS OF ACTIONS—PART PAYMENT—CREDITOR AS AGENT OF DEBTOR.—A creditor cannot be made the agent of the debtor to such an extent as to make an act done by him operate as a new promise to himself. (*Wolford v. Cook*, 315.)

3. LIMITATIONS OF ACTIONS—PART PAYMENT—PROCEEDS OF COLLATERAL SECURITIES.—Where collateral security has been given by a debtor to his creditor, under an agreement that, if necessary, the creditor should sell the collateral and apply the proceeds on his debt, the subsequent sale of such collateral and the application of the proceeds on the debt, to which the debtor made no objection, will not operate as a part payment at the date of the receipt of such proceeds, so as to interrupt the operation of the statute of limitations. (*Wolford v. Cook*, 315.)

4. LIMITATIONS OF ACTIONS—PART PAYMENT—GIVING ADDITIONAL SECURITY.—If a debtor, in the absence of any circumstances tending to rebut the inference of an implied promise to pay the whole debt, gives new and additional security for the payment of the debt, the proceeds of which when collected to be applied on the debt, it will operate as a part payment sufficient to take it out of the statute. (*Wolford v. Cook*, 315.)

5. LIMITATIONS OF ACTIONS—PART PAYMENT—PAYMENT IN GOODS.—It is not necessary, for the purpose of interrupting the statute, that the part payment should be in actual money. A payment in goods may be sufficient for that purpose. (*Wolford v. Cook*, 315.)

6. LIMITATIONS OF ACTIONS—WHAT WILL STOP RUNNING OF STATUTE.—The statute of limitations ceases to run

against a claimant whose power to institute his suit has been taken away by statute, whether such exception is contained in the act of limitation or not. (*Broadfoot v. Fayetteville*, 610.)

7. LIMITATIONS OF ACTIONS—WHAT WILL STOP RUNNING OF STATUTE.—The general rule is, that when the statute of limitations once begins to run no subsequent happening or event can obstruct its course. (*Broadfoot v. Fayetteville*, 610.)

8. LIMITATIONS OF ACTIONS—COUPONS ATTACHED TO BONDS.—The statute of limitations which applies to bonds applies to coupons attached thereto, when such coupons are for interest to become due on the bonds. (*Broadfoot v. Fayetteville*, 610.)

9. LIMITATIONS OF ACTIONS—ABSENCE FROM STATE—CORPORATIONS.—A statute providing for the suspension of the running of the statute of limitations during the absence of a "person" from the state applies to a corporation, and requires such absence as will prevent service of process. (*Turcott v. Railroad*, 661.)

10. LIMITATIONS OF ACTIONS—ABSENCE FROM THE STATE—FOREIGN CORPORATIONS.—A foreign corporation, doing business within a state, and having there agents upon whom process may be served, is not absent from the state within the meaning of a statute suspending the running of the statute of limitations in favor of a person out of the state, though it has failed to file and register its charter as required of foreign corporations doing business within the state before giving them the rights of domestic corporations. (*Turcott v. Railroad*, 661.)

11. LIMITATIONS OF ACTIONS—MECHANICS' LIENS—EFFECT OF SUIT BY SUBCONTRACTOR.—Upon the institution of a suit by a subcontractor to enforce a mechanic's lien, where the general contractor is made a party defendant, and the latter's recorded lien is set forth in the subcontractor's bill, the statute of limitations ceases to run, not only as against the complainant's lien, but as against the lien of the general contractor and of all those claiming as contractors under him. (*Spiller v. Wells*, 878.)

See Mortgages, 3, 4.

LOCAL OPTION.

See Constitutions.

MALICE.

See Husband and Wife, 6, 7; Torts.

MARKET VALUE.

See Damages, 2.

MANDAMUS.

1. MANDAMUS TO COMPEL COUNTY COMMISSIONERS TO LEVY TAX—CONSTITUTION.—Under a constitutional provision prohibiting any tax from being levied by any county, city, or town, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein, before mandamus can be issued to compel the board of commissioners of a county to levy a tax to pay a judgment against the commissioners, the plaintiff—judgment creditor—must show affirmatively by the record or other competent evidence that the consideration of the debt, upon which the judgment was obtained, was of such a character as to fall under the head of ordinary or necessary county expenses. (*Bear v. Commissioners*, 586.)

2. MANDAMUS—NATURE—CIVIL ACTION.—Mandamus is in the nature of a civil action, and is commenced by summons, and the pleadings and the practices are the same as are prescribed for the conducting of civil actions. (Bear v. Commissioners, 586.)

3. MANDAMUS—NATURE.—Mandamus is in the nature, both of an execution and of a civil action. (Bear v. Commissioners, 586.)

See Municipal Corporations, 13.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—ALIMONY—SECURITY.—If there is danger that a divorced husband may dispose of his property by conveyance or squander it, so that nothing will remain upon which the decree of divorce providing for alimony or the support of minor children can operate, the court may require him to furnish security for its performance. (Murphy v. Moyle, 767.)

2. MARRIAGE AND DIVORCE—ALIMONY AFTER DEATH OF HUSBAND.—Whether a divorced wife and minor children, or any of them, are entitled to have the payment of alimony or money for their support continue after the death of the divorced husband depends on the nature and terms of the decree of divorce. (Murphy v. Moyle, 767.)

3. MARRIAGE AND DIVORCE—ALIMONY AFTER DEATH OF HUSBAND.—A decree in a divorce suit granting an absolute divorce and providing that the mother shall have the care and custody of the minor children, and the father shall pay a certain sum monthly toward their support during their minority, is not discharged nor annulled by the death of the father. Its performance may be enforced thereafter out of his estate. (Murphy v. Moyle, 767.)

4. MARRIAGE AND DIVORCE—ALIMONY—SECURITY—EX-FORCEMENT OF LIEN.—If a court, in granting an absolute divorce, decrees that a husband shall pay a certain sum per month toward the support of his minor children, and makes such obligation a lien upon part of his property, it may foreclose the lien upon failure of payment, and its power to do this is not affected by the death of the father; and if the proceeds are insufficient to satisfy the claim, it may enforce payment of the balance out of the estate. (Murphy v. Moyle, 767.)

5. MARRIAGE AND DIVORCE—PROCEEDINGS FOR DIVORCE ARE JUDICIAL IN THEIR NATURE, and should be had in courts of justice under constitutions conferring judicial power on those tribunals. A divorce cannot be granted lawfully except for sufficient cause, upon proof and with notice to, or the appearance of, the party complained of. (In re Christensen, 794.)

6. MARRIAGE AND DIVORCE—WANT OF JURISDICTION. A decree of divorce granted without jurisdiction of the subject matter or of the person, without cause stated and without proof, is absolutely void. (In re Christensen, 794.)

MASTER AND SERVANT.

1. MASTER AND SERVANT—ELECTRIC LIGHT COMPANIES—DUTY TO LINEMEN.—An electric light company does not owe to a lineman, whose business it is to work upon poles on which the company's wires are suspended, the duty to inspect its poles below the surface of the ground to ascertain whether they are decayed, and to inform him of that fact if such is found to be the case. (McIsaac v. Northampton Elec. L. Co., 244.)

2. MASTER AND SERVANT—ELECTRIC LIGHT COMPANIES AND LINEMEN—ASSUMPTION OF RISKS—POLES.—When a lineman enters the service of an electric light company for the purpose of working upon poles on which the company's wires are suspended, he assumes the risk that a pole of uncertain age may break and fall when a lineman is working upon it, if he does not take measures to ascertain its condition before going upon it. (*McIsaac v. Northampton Elec. L. Co.*, 244.)

3. MASTER AND SERVANT—DUTY OF MASTER—SAFE APPLIANCES.—The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence cannot be attributed to the negligence of a fellow-servant. (*Troxler v. Southern Ry. Co.*, 580.)

4. MASTER AND SERVANT—CONTINUING NEGLIGENCE OF MASTER—CONTRIBUTORY NEGLIGENCE OF SERVANT.—Where the negligence of the defendant is a continuing negligence, there can be no contributory negligence which will discharge the master's liability. (*Troxler v. Southern Ry. Co.*, 580.)

5. MASTER AND SERVANT—NEGLIGENCE PER SE—FAILURE TO USE SAFE APPLIANCES IN GENERAL USE.—When safer appliances have been invented, tested, and have come into general use, it is negligence per se for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers. (*Troxler v. Southern Ry. Co.*, 580.)

6. MASTER AND SERVANT—ASSUMPTION OF RISK.—Danger from a bank or wall of earth falling is one open to common observation, and a servant engaged in excavating a ditch who, knowing that he is exposed to such danger, continues to work, assumes the risks and is not entitled to recover for injuries sustained. (*Brown v. Electric Ry. Co.*, 666.)

7. MASTER AND SERVANT—DANGEROUS EMPLOYMENT—DUTY OF MASTER—DELEGATION OF DUTY.—When an employment is in its nature perilous, it is the duty of the master to provide reasonable and necessary precautions and safeguards against such perils, and no delegation of that duty can relieve him from responsibility for failure to perform it. (*Portance v. Lehigh Val. Coal Co.*, 932.)

8. MASTER AND SERVANT—DUTY OF MASTER TO SERVANT.—The duty of a master to his servant is to provide him reasonably safe and proper tools, implements, and apparatus with which to work, reasonably competent and careful coemployés, and a reasonably safe place to work. (*Portance v. Lehigh Val. Coal Co.*, 932.)

9. MASTER AND SERVANT—FELLOW-SERVANTS.—In unloading coal from a vessel, servants engaged in the common undertaking, under common direction and command, with no right of control one over the other, as the scraper-man, whose duty it is to start the machinery, the hatch-man, whose duty it is to signal the starting of machinery by the scraper-man, and to give warning to servants in the hold of the vessel, and other servants engaged in the common undertaking, are fellow-servants. (*Portance v. Lehigh Val. Coal Co.*, 932.)

10. MASTER AND SERVANT—PRECAUTIONARY REGULATIONS—ASSUMPTION OF RISK.—A servant of ten years' experience in the unloading of coal from vessels, who has worked in a particular employment of that kind, where all the conditions are the usual ones, for several months, will be held to have assumed any

risk arising from a lack of precautionary regulations prescribed by his master. (*Portance v. Lehigh Val. Coal Co.*, 932.)

11. MASTER AND SERVANT—WARNING OF STARTING OF MACHINERY—NEGLIGENCE OF FELLOW-SERVANT.—In entering upon an employment a servant assumes the risk of the negligence of fellow-servants, and if the master properly selects such a fellow-servant to give warning of the starting of machinery, and instructs him for that purpose, he is not responsible for the negligence of such servant in the performance of such duty, resulting in injury to a coemployé. (*Portance v. Lehigh Val. Coal Co.*, 932.)

See *Railroad Companies*, 13, 14, 25-27.

MECHANIC'S LIEN.

1. MECHANICS' LIENS—FLATS AS ONE BUILDING.—Flats built on adjacent lots belonging to the same owner are one building, for the purpose of a mechanic's lien, although the division wall rises above the roof, and there are separate entrances, if they are erected as one structure, under one contract, at the same time, heated with one furnace, and a porch extends across the entire rear of the structure with one continuous and unbroken roof. (*Bastrup v. Prendergast*, 128.)

2. MECHANICS' LIENS—WANT OF DESCRIPTION OF PROPERTY IN CONTRACT.—The mere omission of a description or designation of the property in a building contract cannot defeat a mechanic's lien otherwise established when the notice, or claim of lien, filed for record properly describes the property, and all of the interested parties understood what property was referred to in the contract, and the material was furnished and the building erected upon that understanding. (*Bastrup v. Prendergast*, 128.)

3. MECHANICS' LIENS—ESTOPPEL AGAINST WIFE.—If a wife, with knowledge that her husband has made false representations as to the ownership of property and has contracted in his own name for the erection of buildings thereon, assists in procuring the work to be done under the contracts, without disclosing to the contractor her title to the property, which is of record, she is estopped to assert her title for the purpose of defeating a mechanic's lien arising out of such contract. (*Bastrup v. Prendergast*, 128.)

4. MECHANICS' LIENS—ESSENTIAL AVERMENTS OMITTED from the notice of a mechanic's lien cannot, in an action to foreclose the lien, be supplied by averments in the complaint or by extrinsic evidence. (*Morrison v. Willard*, 784.)

5. MECHANICS' LIEN—NOTICE—SUFFICIENCY OF.—A notice of mechanic's lien which fails to show that the material was furnished for the construction of the building in question, or that any portion of the material was used in the construction, or purchased for the purpose of constructing the building referred to in the notice of lien, and which also fails to show the terms, time given, and conditions of the contract, and which contains no statement, except inferentially, as to what the contract was, how much lumber was purchased, what price was agreed to be paid for it, whether it was purchased or delivered for the purpose of constructing the building in question, or whether it was ever used therein, is insufficient and void. (*Morrison v. Willard*, 784.)

6. MECHANICS' LIENS—NOTICE—ESSENTIALS OF.—A notice of mechanic's lien must contain and set out, as far as the claimant is able to ascertain and disclose it, the contract between the owner and contractor, so that the price, terms, and conditions

of the contract may be known as affecting the rights and interests of the subcontractor and others interested. Otherwise, the notice is insufficient and void. (*Morrison v. Willard*, 784.)

7. MECHANICS' LIENS—SUIT BY SUBCONTRACTOR TO ENFORCE—PRECEDENCE WHERE DIFFERENT COURTS HAVE CONCURRENT JURISDICTION.—If a subcontractor institutes a suit in chancery to enforce a mechanic's lien, and makes the general contractor a party defendant, setting forth the latter's recorded lien in his bill, that court, notwithstanding the concurrent jurisdiction of another court, acquires jurisdiction, and should determine the rights of the parties. It is not incumbent on the general contractor to institute a separate suit in order to enforce his lien, as his rights, as well as those claiming under him as subcontractors, may be fully protected in the first suit. (*Spiller v. Wells*, 878.)

See Limitations of Actions, 11.

MISTAKE.

See Vendor and Purchaser, 6.

MORTGAGES.

1. MORTGAGES — FORECLOSURE — REDEMPTION—LACHES.—An equitable right to redeem from a foreclosure sale may be lost by laches unless asserted within a reasonable time, and before the situation of the parties has changed, and the rights of others have intervened, or improvements have been made. (*Walker v. Warner*, 85.)

2. MORTGAGES — FORECLOSURE — REDEMPTION—LACHES.—Whether an equitable right to redeem from a foreclosure sale has been lost by laches must be determined with reference to the date of the amended petition praying redemption, when the original petition seeks to establish a fee simple title in the complainant. (*Walker v. Warner*, 85.)

3. MORTGAGES—PAYMENTS—LIMITATIONS.—The effect of payments upon a mortgage debt must be determined by the statute in force at the time they were made, with reference to the tolling of the statute of limitations, although the mortgage was executed prior to such time. (*Walker v. Warner*, 85.)

4. MORTGAGES — FORECLOSURE — REDEMPTION—LACHES — LIMITATIONS.—In determining whether there has been laches in exercising a right of redemption from a mortgage foreclosure, a court of equity is not necessarily controlled by the period of limitations as fixed in actions at law. A delay for a much less time than that prescribed by the statute of limitations may, according to the circumstances of the case, be held to be laches, and a bar to the right of redemption. (*Walker v. Warner*, 85.)

5. MORTGAGES — FORECLOSURE — REDEMPTION BY GRANTEE OF MORTGAGOR.—By foreclosure of a mortgage, sale of the premises, and master's deed thereunder, the legal title becomes vested in the grantee, leaving nothing in the mortgagor or his grantee to whom he has conveyed before the commencement of the foreclosure proceeding, but to which the latter is not made a party, except the right of redemption, which must be asserted in a court of equity. (*Walker v. Warner*, 85.)

6. MORTGAGES — FORECLOSURE — REDEMPTION—LACHES.—An equity of redemption from a mortgage foreclosure cannot be enforced when all parties have supposed that the fore-

closure was good, and the holder of the equity of redemption has abandoned the premises and all claim to them, never paying any taxes or offering to redeem, until after a series of years, when the property had passed through many hands and had become valuable. (Walker v. Warner, 85.)

7. MORTGAGES—DEPOSIT OF TITLE DEEDS.—A mortgage attempted to be made by the deposit of title deeds cannot be enforced, although the loan secured by such deposit has been actually received by the depositor. (Bloomfield State Bank v. Miller, 381.)

8. MORTGAGES—DEPOSIT OF TITLE DEEDS.—A mortgage cannot be created by the deposit of title deeds without a writing, as such mortgage is contrary to the statute of frauds and the recording acts. (Bloomfield State Bank v. Miller, 381.)

9. MORTGAGE GIVEN WITHOUT CONSIDERATION TO DEFRAUD CREDITORS—RIGHTS OF ASSIGNEE.—Where a mortgage is given without consideration, to defraud creditors, the dishonest mortgagor is equitably estopped from claiming that there was no consideration for the mortgage, as against a purchaser in good faith, for value, and without notice. (Moffett v. Parker, 319.)

10. MORTGAGES—USURY—GRANTEE ASSUMING MORTGAGE—ESTOPPEL.—A vendee who accepts a conveyance of land subject to a mortgage thereon, and containing a covenant whereby such vendee assumes and agrees to pay said mortgage, is estopped from asserting that the obligation secured thereby is usurious. (Scanlan v. Grimmer, 326.)

11. MORTGAGES—RIGHTS OF ASSIGNEE—EQUITIES OF THIRD PARTIES.—A mortgage has none of the privileges of negotiable paper, but is a mere chose in action. Hence, an assignee thereof takes it subject to any defense that exists between the original parties, unless they are equitably estopped by their acts, or otherwise, from asserting it as against the assignee; but the assignee does not take it subject to any equities of third parties of which he has no notice. (Moffett v. Parker, 319.)

12. MORTGAGES—DEFENSE AGAINST MORTGAGEE.—A mortgagor in a real estate mortgage, given without consideration to defraud creditors, may enjoin its foreclosure by the mortgagee. (Moffett v. Parker, 319.)

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—ENFORCEMENT OF VACCINATION ORDINANCE—LIABILITY FOR DAMAGES.—A municipal corporation is not liable to a citizen who may sustain damage on account of impure vaccine matter administered to him by the officer or agent of such corporation in the enforcement of an ordinance requiring citizens of the city to submit to vaccination. (Wyatt v. Rome, 41.)

2. MUNICIPAL CORPORATIONS ARE NOT LIABLE FOR THE NEGLIGENCE OF ITS OFFICERS or agents in executing sanitary regulations adopted for the purpose of preventing the spread of contagious disease. (Wyatt v. Rome, 41.)

3. MUNICIPAL CORPORATIONS—SEWER CONTRACT—POWER OF CITY COUNCIL TO WAIVE COMPLIANCE WITH.—If the charter of a city does not make all details in the construction of sewers the basis of the consent of property owners, but leaves such details to the common council, that body has power to waive the performance of any of the requirements of a sewer contract. Hence, after part of the work under a sewer contract has

been done, but not in conformity with the contract, the common council may, before the completion of the work, so modify the contract as to make it conform with the work already done, leaving the remaining portion of the work to be constructed according to the terms of the original contract, without modification. (*Weston v. Syracuse*, 472.)

4. MUNICIPAL CORPORATIONS—SEWER CONTRACT—WHAT ACT IS ADMINISTRATIVE AND NOT LEGISLATIVE—POWER OF COURTS.—If a contract for the construction of a sewer is modified by a city council, by resolution, the action taken by such resolution is not a legislative act, but an administrative one, and is not free from direct review or collateral attack in the courts. (*Weston v. Syracuse*, 472.)

5. MUNICIPAL CORPORATIONS—SEWER CONTRACT—CERTIFICATE OF CITY ENGINEER—SUFFICIENCY OF.—If part of the work under a sewer contract has been done, but not in conformity with the specifications, and the city council passes a resolution modifying the contract so as to make it conform to the work already done, a requirement in the contract that the contractor shall obtain the city engineer's certificate of compliance with the contract as a prerequisite to payment, is satisfied by a certificate that the work done before the resolution complies with the contract as modified, while the remainder complies with it, as unmodified. (*Weston v. Syracuse*, 472.)

6. MUNICIPAL CORPORATIONS—DEFENSE TO CONTRACTOR'S SUIT—WHAT MAY BE INTERPOSED.—That which a taxpayer can accomplish for the protection of a city, by a suit under the "taxpayer's act," the officers of the city, whose duty it is to protect its property from waste and injury, may bring about by a defense to an action brought by a contractor to recover on a contract for the construction of a sewer, or other local improvement. (*Weston v. Syracuse*, 472.)

7. ESTOPPEL AGAINST CITY—SEWER CONTRACT—BRIBERY—KNOWLEDGE OF OFFICERS.—A city is not estopped by the conduct of its officers from denying the validity of a resolution passed by the city council, modifying a contract for the construction of a sewer, alleged to have been brought about by bribery, where it does not appear that the officers of the city knew of the alleged bribery at the time of the several acts which the plaintiff relies upon to create an estoppel. (*Weston v. Syracuse*, 472.)

8. MUNICIPAL CORPORATIONS—SEWER CONTRACT—RESOLUTION MODIFYING IS VITIATED BY FRAUD AND CORRUPTION—INVALIDITY OF, AS A DEFENSE.—A resolution passed by a city council, modifying a contract for the construction of a sewer can, if adopted by means of fraud and corruption, be declared of no effect by the courts; and the invalidity of the resolution is a good defense, on the part of the city, to an action brought by the contractor, especially if he was a guilty participant in the fraud. (*Weston v. Syracuse*, 472.)

9. MUNICIPAL CORPORATIONS—SEWER CONTRACT—CONTRACTOR'S RIGHT OF ACTION FOR BREACH OF.—If a city contracts for the construction of a sewer, or other local improvement, provision being made in the contract that no payment shall be made until the cost has been collected by a special assessment, and the work is done according to the contract as originally executed, or as lawfully modified, the contractor is entitled to maintain an action against the city for breach of contract where the latter ignores the plaintiff's rights in the premises, not only by re-

fusing to make the assessment, but by repudiating the contract, and entering into an agreement with others for reconstructing a portion of the sewer. (*Weston v. Syracuse*, 472.)

10. MUNICIPAL CORPORATIONS — SEWER CONTRACT WITH—REMEDIES TO ENFORCE PAYMENT.—If a city contracts for the construction of a sewer, or other local improvement, and the only way provided for payment is through a special assessment, it is the duty of the city to collect the assessment and turn over the proceeds to the contractor; and, if it does not proceed with reasonable diligence to do so, he may and should proceed by mandamus to compel such action on its part; but, if the city disables itself from performing the contract by some act which renders the assessment void and uncollectible, or if it refuses to perform the contract, then the contractor's remedy against the city is by action for breach of the contract. (*Weston v. Syracuse*, 472.)

11. MUNICIPAL CORPORATIONS — ORDINANCES — DEALING IN OLD RAGS.—A city ordinance which forbids the business of collecting, storing, and dealing in old rags, old papers, or other such refuse material, within the thickly settled portions of the city, except when conducted by licensed persons, is reasonable and valid. (*Commonwealth v. Hubley*, 242.)

12. MUNICIPAL CORPORATIONS — NEGLIGENCE — WORK DONE FOR PRIVATE CORPORATE BENEFIT.—Where a city, having been empowered to improve its streets and assess the cost of improvements to abutting owners, owns and operates a steam roller and retains compensation for rolling streets when macadamized, its liability for injuries resulting from fire started through the negligent operation of the roller is similar to that of an individual engaged in doing the same work. It cannot escape such liability by pleading that the work was done for the public benefit. (*McMahon v. Dubuque*, 143.)

13. MUNICIPAL CORPORATIONS—TAXATION—MANDAMUS TO COMPEL.—Where statutes have been passed, abrogating or restricting the power of taxation delegated to a municipality upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, a party interested may by mandamus compel the exercise of that power as if no legislation had ever been attempted. (*Broadfoot v. Fayetteville*, 610.)

14. MUNICIPAL CORPORATIONS—BONDS—POWER TO TAX FOR PAYMENT OF.—Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds, is forbidden by the constitution of the United States, and is null and void. (*Broadfoot v. Fayetteville*, 610.)

15. MUNICIPAL CORPORATION — BONDS — PAYMENT BY NEW CORPORATION—STATUTE PROHIBITING.—Where a municipal corporation has issued bonds, and before their payment its charter has been repealed and a new corporation formed, a statute which prohibits the levying of taxes for the payment of the bonds by the new corporation is invalid and cannot be regarded. (*Broadfoot v. Fayetteville*, 610.)

16. MUNICIPAL CORPORATIONS—REMEDIES OF CREDITORS—POWER OF LEGISLATURE.—The remedies of a creditor for the enforcement of his debt assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or, if they are changed, a substantial equivalent must be provided. (*Broadfoot v. Fayetteville*, 610.)

17. MUNICIPAL CORPORATIONS—REPEAL OF CHARTER—EFFECT ON DEBTS.—Debts due from a municipal corporation are not extinguished by the repeal of its charter, and still exist notwithstanding that repeal. (*Broadfoot v. Fayetteville*, 610.)

18. MUNICIPAL CORPORATIONS—LIABILITY OF NEW CORPORATION FOR DEBTS OF OLD.—When the old charter of a municipal corporation is repealed and a new one is granted, upon which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new; where the benefits are taken, the burdens are assumed. (*Broadfoot v. Fayetteville*, 610.)

19. MUNICIPAL CORPORATIONS—WHEN A NEW CORPORATION IS THE SUCCESSOR OF AN OLD ONE.—Where the old charter of a municipal corporation has been repealed, and a new one, creating a new corporation, has been granted, the new corporation, embracing the same territory, the same inhabitants and the same taxable property, is considered as the successor of the old. (*Broadfoot v. Fayetteville*, 610.)

20. MUNICIPAL CORPORATIONS—LIABILITY OF SUCCESSOR OF OLD CORPORATION—CONSIDERATION.—The foundation on which the liability of a new municipal corporation for the debts of the old rests, is that the new corporation embraces the same territory, the same corporators, the same taxable property, and has received the property of the old corporation without consideration; and for these benefits must, in return, bear the burdens of the old corporation. (*Broadfoot v. Fayetteville*, 610.)

21. MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—STATUTES PROHIBITING PAYMENT OF DEBTS OF OLD CORPORATION.—A statute expressly prohibiting a municipal corporation from assuming the debts of its predecessor, or from paying any part of them, is unconstitutional. (*Broadfoot v. Fayetteville*, 610.)

22. MUNICIPAL CORPORATIONS—PUBLIC AND CORPORATE DUTIES—LIABILITY ARISING FROM PERFORMANCE.—While a municipal corporation sustains no liability to one suffering injury from the negligent or imperfect exercise of its legislative or governmental powers, the contrary is true as respects the performance and execution of mere corporate duties. As respects such matters, the rule of respondeat superior applies, and the city will become liable for the act of its servants and agents which it has authorized or adopted. (*Hollman v. Platteville*, 899.)

— See Cemeteries, 2.

MURDER.

See Homicide.

NAMES.

1. NAMES, CONTRACT UNDER ASSUMED—IDENTITY.—A person, not engaged in a fraudulent or criminal purpose, may enter into a contract under any name he may choose to assume. All that the law looks to is the identity of the individual, and when that is established the act will be binding upon him and upon others. (*Scanlan v. Grimmer*, 326.)

2. NAMES, CONTRACT UNDER ASSUMED—KNOWLEDGE OF OTHER PARTY.—A contract entered into under an assumed name is binding, even though the other parties thereto were in-

duced to believe that the assumed name was the person's real name, and though such parties were opposed to entering into a transaction with the person himself. (*Scanlan v. Grimmer*, 326.)

NEGLIGENCE.

1. NEGLIGENCE.—ALTHOUGH A PERSON IS BOUND TO USE ORDINARY CARE to protect himself against the known dangers of his situation, he need not exercise care to protect himself against an intentional injury by another of which he has no notice. (*Illinois Central R. R. Co. v. King*, 93.)

2. NEGLIGENCE—TRUCKMEN—MOVING OF HEAVY MACHINERY—COMMON CARRIERS.—It is not material, in any action against truckmen to recover damages for injuries to heavy machinery, which they have been employed to transport, whether the defendants are answerable as common carriers, where the case is tried and submitted to the jury, not upon the theory that the defendants are liable as insurers of the safety of the property, but upon the theory that they were negligent in unloading the machine, and thus caused the injuries. It was not, therefore, prejudicial to the defendants for the trial court to refuse to charge that they were not common carriers. (*Jackson etc. Works v. Hurlbut*, 432.)

3. NEGLIGENCE—TRUCKMEN—MOVING OF HEAVY MACHINERY—LIABILITY.—If truckmen are employed to transport a large and heavy planing machine, used for planing iron, they must use, at least, ordinary diligence and care, and are answerable if they negligently break and seriously injure the machine while unloading it. (*Jackson etc. Works v. Hurlbut*, 432.)

4. COMPARATIVE NEGLIGENCE.—The doctrine of comparative negligence has never been recognized in Minnesota. (*Fonda v. St. Paul City Ry. Co.*, 341.)

5. NEGLIGENCE—STANDARD OF DUTY.—A person cannot, by the adoption of private rules, fix the standard of his duty to others. (*Fonda v. St. Paul City Ry. Co.*, 341.)

6. CONTRIBUTORY NEGLIGENCE—POWER OF DEFENDANT TO AVOID CONSEQUENCES OF PLAINTIFF'S NEGLIGENCE.—The doctrine that a plaintiff may recover if the defendant might, by the exercise of care, have avoided the consequences of the plaintiff's negligence, is only applicable to cases in which the plaintiff's negligence preceded that of the defendant. But when the negligence of the two persons is contemporaneous, and the fault of each operates directly to cause the injury, neither can recover from the other. (*Fonda v. St. Paul City Ry. Co.*, 341.)

7. CONTRIBUTORY NEGLIGENCE—WILLFUL ACT OF DEFENDANT.—Where the defendant's acts are willful and intentional, the negligence of the plaintiff, if any, is no longer deemed in law a proximate cause of the injury. (*Fonda v. St. Paul City Ry. Co.*, 341.)

8. NEGLIGENCE—ACTION FOR DEATH OF HUSBAND—RELEASE BY HUSBAND.—A settlement and adjustment of a claim for personal injuries made by a deceased husband in his lifetime bars an action by his widow for his death resulting from such injuries. (*Brown v. Electric Ry. Co.*, 666.)

See Animals; Banks and Banking, 2, 3; Damages, 4; Innkeepers, 1, 2; Landlord and Tenant, 1, 5; Master and Servant, 4, 5, 11; Municipal Corporations, 2; Railroad Companies, 11, 19, 20, 22, 27; Telegraph Companies, 4, 5, 6; Waterworks and Water Companies, 5.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS—NOTICE THAT NOTES ARE HELD AS COLLATERAL.**—The mere fact that negotiable notes indorsed in blank by the payee are overdue is not sufficient to charge a bank advancing money thereon to the holder with constructive notice that the notes are held merely as collateral security. (*Young Men's C. A. etc. Co. v. Rockford Nat. Bank*, 135.)

2. **NEGOTIABLE INSTRUMENTS—PURCHASE OF OVERDUE NOTES INDORSED IN BLANK—PROTECTION AGAINST THIRD PARTIES.**—A bank advancing money to the holder of overdue negotiable notes indorsed in blank by the payee without notice that they are held as collateral security is protected against latent equities in third parties. (*Young Men's C. A. etc. Co. v. Rockford Nat. Bank*, 135.)

3. **NEGOTIABLE INSTRUMENTS—WHAT WORDS DO NOT BIND ONE AS AN INDORSER.**—The words, "Estate of Jona. D. Wheeler, Henry F. Wing, Executor," indorsed on a promissory note, mean "Estate of Wheeler by Wing," and do not bind Wing by contract. Wing's estate is not, therefore, liable upon such an indorsement. (*Grafton Nat. Bank v. Wing*, 303.)

4. **NEGOTIABLE INSTRUMENTS — INDORSEMENT — EVIDENCE.**—If commercial paper is indorsed in blank, parol evidence is admissible to show that the terms of the agreement between the parties are other and different from those which arise by presumption of law. (*United States Nat. Bank v. Geer*, 390.)

5. **NEGOTIABLE INSTRUMENTS — INDORSEMENT — EVIDENCE.**—A certificate of deposit indorsed for collection for the account of the indorser is a restrictive indorsement which vests no general property in the paper in the indorsee, but makes him merely a collection agent; and parol evidence is not admissible to show that the transfer of the title was intended to be absolute. (*United States Nat. Bank v. Geer*, 390.)

6. **NEGOTIABLE INSTRUMENTS — INDORSEMENT — EVIDENCE.**—A restrictive indorsement to commercial paper unambiguous in its terms, cannot be contradicted or explained by parol evidence. (*United States Nat. Bank v. Geer*, 390.)

7. **NEGOTIABLE INSTRUMENTS — RELATION OF INDORSER AND HOLDER.**—The relation of an indorser and a holder of negotiable paper is analogous to that of a principal and surety. (*Mercantile Nat. Bank v. Macfarlane*, 352.)

See *Contracts*, 6, 7; *Evidence*, 5-7; *Executors and Administrators*; *Insolvency*, 4, 5.

NONSUIT.

See *Appeal*, 16.

NOTARIES PUBLIC.

NOTARIES PUBLIC—OFFICIAL SEAL.—A notary public is required to attach his official seal to his official acts, and his certificate, unauthenticated by the impression of such seal, is void. (*Weldon v. Atkinson*, 416.)

See *Banks and Banking*.

NOTICE

See Corporations, 20, 28, 33; Cotenancy, 1; Deeds, 5; Eminent Domain, 5; Insane Persons, 1; Liens, 1; Mechanic's Lien, 5, 6; Negotiable Instruments, 1; Telegraph Companies, 1; Vendor and Purchaser, 3, 5.

NUISANCE.

See Railroad Companies, 24.

OCCUPANCY.

See Homestead, 4.

ORIGINAL PACKAGE.

See Interstate Commerce, 3, 4.

PARENT AND CHILD.

See Descent; Husband and Wife, 5-7; Wills, 5.

PARTIES.

See Guardian and Ward, 3; Negotiable Instruments, 4.

PAYMENT.

PAYMENT—EFFECT OF PRESCRIBING WAY OF.—If a way of payment is prescribed by statute, or by contract, that way must be strictly pursued. (*Weston v. Syracuse*, 472.)

See Deeds, 1; Insurance, 12-14; Judgment, 1, 2; Limitations of Actions, 1-5; Mortgages, 3.

PERCOLATING WATERS.

See Waters and Watercourses, 1-3.

PERJURY.

See Judgment, 4.

PHYSICIANS AND SURGEONS.

See Witnesses, 15.

PLEADING.

PLEADING—BILL IN EQUITY.—MULTIFARIOUSNESS does not arise from the presentation of different views of the same collocation of facts, but it must be two distinct collocations of distinct and different facts, each collocation presenting different rights, and calling for different relief. Hence, a bill is not multifarious because a party states his case in the alternative. (*Snyder v. Grandstaff*, 863.)

See Contracts, 8; Elevators; Equity, 4, 6, 8; Estoppel, 2, 3.

POLICE POWER.

1. POLICE POWER—PROTECTION OF PUBLIC HEALTH—DEALING IN OLD RAGS.—As the business of collecting, storing, and dealing in old rags, old papers, and like material, may be dangerous to the health of the community, it is proper that trustworthy persons only should be permitted to carry it on. When the interests of individuals conflict with the rights of the public, the individual interest must yield to the paramount right. (*Commonwealth v. Hubley*, 242.)

2. FOODS—ADULTERATION OF.—An indictment charging the manufacture and offer for sale of an adulterated article of food must allege the article with which it is adulterated, under a statute which makes any article of food criminally adulterated “if any substance or substances has or have been mixed with it so as to reduce or lower or injuriously affect its quality or strength, or if any inferior or cheaper substance or substances have been substituted wholly or in part for the article.” (Dorsey v. State, 762.)

3. FOODS—ADULTERATION OF—POWER TO REGULATE.—A statute providing that, if certain named wholesome and nutritious articles of food are mixed or intermingled, the product must be labeled, showing the component elements thereof, and punishing a failure to so label, is valid, but a statute which embraces all articles of food or drink, without naming any, and makes the mixture of any articles of food, however nutritious, without labeling the product, an offense, is too general in its terms and cannot be enforced. (Dorsey v. State, 762.)

4. FOODS—ADULTERATION OF—POWER TO PROHIBIT.—Under the police power of the state, the legislature may legally pass an act stating in distinct terms, as to any article of food or drink, that if any person shall adulterate such article, naming it, with any other substance, without labeling it, he shall be guilty of an offense; but it is not competent to make criminal the mixing or mingling of articles of food which are wholesome and nutritious and absolutely prohibit the sale thereof. (Dorsey v. State, 762.)

5. CONSTITUTIONAL LAW—POLICE POWER—KEEPING INTOXICATING LIQUORS.—The keeping of liquors in his possession by a person whether for himself or another, unless he does so for the illegal sale thereof, or for some other improper purpose, cannot injure or affect the health, morals, or safety of the public. Hence a statute prohibiting such keeping in possession is not a legitimate exercise of the police power, but it is an abridgement of the privileges and immunities of the citizen, without any legal justification, and therefore void. (Ex parte Brown, 743.)

6. CONSTITUTIONAL LAW—POLICE REGULATIONS.—The state may interfere under its police power to prohibit the keeping of property injurious to the lives, health, and comfort of all persons, but it is not authorized, under the guise of a police regulation, to invade the fundamental privileges and interfere with the full enjoyment by the citizen of his recognized property rights, and if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those subjects, it is the duty of the courts to so adjudge. (Ex parte Brown, 743.)

7. CONSTITUTIONAL LAW—POLICE POWER—INTOXICATING LIQUORS.—An attempt by the legislature to make the keeping of liquor by one citizen for another in a local option territory, whether in a house, tent, or anywhere else, and whether for a consideration or without, a crime, or an attempt on the part of the legislature to make it criminal for a person who may be the owner or proprietor of any building, in local option territory, to solicit or take and order for another person for intoxicating liquors, to be sent or delivered to the proprietor or owner of such house for the person giving such order, is without authority of law, as violative of the citizen's fundamental right to use his own property as he pleases, not injuring another person, and it is not competent for the legislature, under its power of police regulation, to impair the legal ownership and holding of one's property, either by himself or by another person. (Ex parte Brown, 743.)

8. POLICE POWER—REGULATION BY STATES OF INTER-STATE COMMERCE.—Every state has the right under its reserved police power to prohibit the importation and sale of all articles inherently unworthy of commerce and unfit for the use of its people, and, in the absence of congressional action to the contrary, the determination by a state legislature that an article of doubtful commercial quality is not a legitimate article of commerce, is conclusive. (*Austin v. State*, 703.)

9. POLICE POWER — MANUFACTURE AND SALE OF CIGARETTES.—A state statute prohibiting the sale of cigarettes manufactured within the state, is valid as an internal police regulation. (*Austin v. State*, 703.)

PRELIMINARY EXAMINATION.

See Criminal Law, 3-7, 10.

PRESCRIPTION.

See Waters and Watercourses, 2.

PRESUMPTION.

PRESUMPTION — SUPPRESSION OF EVIDENCE.—The presumption arising from the spoliation or suppression of evidence that it would, if produced, be unfavorable to the party destroying or suppressing it, is not limited to the case of documentary evidence is the exclusive possession and control of the party. (*Fonda v. St. Paul City Ry. Co.*, 341.)

See Burden of Proof; Corporations, 29, 34; Courts; Evidence, 4; Homicide, 9; Judgment, 6; Rape, 4; Statutes, 21; Vendor and Purchaser, 2; Witnesses, 6.

PRIVATE WAYS.

See Cotenancy, 5.

PROCEDURE.

See Statutes, 2.

PROCESS.

See Jurisdiction, 2.

RAILROAD COMPANIES.

1. RAILROAD COMPANIES—DUTY TO TRESPASSERS.—A person stealing a ride on a railroad train is a trespasser and gains no rights; but it is the duty of the railroad company and its employes not to injure him willfully or intentionally. (*Illinois Central R. R. Co. v. King*, 93.)

2. RAILROAD COMPANIES — DUTY TO TRESPASSERS — LIABILITY FOR ACT OF BRAKEMAN.—A railroad company is liable for the willful act of its brakeman within the scope of his authority in putting a trespasser off its train. (*Illinois Central R. R. Co. v. King*, 93.)

3. RAILROAD COMPANIES—DUTY TO TRESPASSERS—EVIDENCE OF WILLFULNESS.—Evidence that a brakeman pulled a person who was stealing a ride on a railroad train from under the train while it was in motion, and manifested his feeling and willingness to inflict needless injury by cursing him and throwing a

stone at him, is evidence that the act of the brakeman was willful. (Illinois Central R. R. Co. v. King, 93.)

4. RAILROAD COMPANIES—LIABILITY FOR WILLFUL INJURY TO TRESPASSER.—The negligence of a trespasser in taking a position under the cars to steal a ride upon a train is not an issue in an action to recover for injury received while he was being dragged from such position by the willful act of a brakeman while the train was in motion. (Illinois Central R. R. Co. v. King, 93.)

5. RAILROAD COMPANIES—ENTRY ON LAND—RIGHT TO IMPROVEMENTS.—If a railroad company lawfully enters upon land under conveyance from a tenant for life, and makes improvements necessary to its business, it has a right, upon abandoning the premises at the expiration of the life estate, to remove such improvements, and, if it continues in possession thereafter, the value of such improvements should not be considered in assessing the damages to which the remainderman is entitled. The amount which the latter is entitled to recover is the market value of the property at the time the life estate terminated, with interest, the value of such improvements placed on the property at the expense of the company and necessary to its business not being considered in ascertaining such market value. (Charleston etc. Ry. Co. v. Hughes, 17.)

6. RAILROAD COMPANIES—ENTRY ON LAND—EJECTMENT.—If a railroad company enters upon land and constructs its road either with the consent of the owner or without lawful authority, and the landowner acquiesces in the appropriation of the property to a great public use until it has become a necessary component part of the property acquired by the railroad to perform its public duties, the landowner must be held to have waived his right to retake the property in ejectment, and must be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. (Charleston etc. Ry. Co. v. Hughes, 17.)

7. RAILROAD COMPANIES—ENTRY ON LAND BY CONSENT—ESTOPPEL AGAINST LANDOWNER.—If a railroad company enters upon land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a component part of its railroad that to surrender its possession would interfere seriously with the interests of the company or of the public, the landowner, though entitled to compensation for his property, is estopped from asserting against the company the legal title to the property by an action of ejectment. (Charleston etc. Ry. Co. v. Hughes, 17.)

8. RAILROAD COMPANIES—LEGISLATIVE POWERS OVER—REASONABLE REGULATION.—The property of a railroad company is dedicated to a public use, and the legislature has the power to regulate that use in a reasonable manner, unless the charter of the railroad company expressly protects it from such regulation. The compelling of intersecting lines to put in a connecting switch is a reasonable regulation. (Jacobson v. Wisconsin etc. R. R. Co., 358.)

9. RAILROAD COMPANIES—LEGISLATIVE POWER OVER.—The legislature has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered. (Jacobson v. Wisconsin etc. R. R. Co., 358.)

10. RAILROAD COMPANIES—INCIDENTAL POWERS.—As incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies. (*Jacobson v. Wisconsin etc. R. R. Co.*, 358.)

11. STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE—WANTON CONDUCT OF MOTORMAN.—A plaintiff may recover of a street railway company, notwithstanding that he might have negligently placed himself in a place of danger, if the conduct of the motorman in running him down was wanton and willful, or if, after discovering the plaintiff in a place of danger in time to have prevented the injury by the exercise of reasonable care, he failed to do so. (*Fonda v. St. Paul City Ry. Co.*, 341.)

12. STREET RAILWAYS—EVIDENCE—GENERAL INCOMPETENCY OF MOTORMAN.—Evidence of the general incompetency of a motorman, based on the observations of witnesses who had seen him operate his car on prior occasions, is inadmissible to establish negligence at the time of the accident. (*Fonda v. St. Paul City Ry. Co.*, 341.)

13. STREET RAILWAYS—MASTER AND SERVANT—EVIDENCE—RULES OF COMPANY.—The private rules of a master regulating the conduct of his servants in the management of his own business, intended only for the guidance of his servants, although designed for the protection of others, are not admissible in evidence to establish negligence on the part of the master. (*Fonda v. St. Paul City Ry. Co.*, 341.)

14. RAILROADS—COUPLING OF CARS—ASSUMPTION OF RISKS—LIABILITY FOR INJURY.—If one railroad receives a car from another railroad, with a drawbar different in make and height from that which it uses itself, and an experienced man is ordered to couple the cars together by a link and pin, but he is crushed between the sills of the cars while attempting to make the connection, because one drawbar slides over the other, the railroad company is not answerable for the injury, because the difference in height was an obvious risk assumed by the plaintiff. (*Ellsbury v. New York etc. R. R. Co.*, 248.)

15. RAILROADS—STREET-CARS—RISK ASSUMED BY PASSENGER—EXPELLING DRUNKEN MAN.—A passenger upon a street-car assumes the risk, when he takes passage, of the consequences of a lawful and reasonable act of the conductor in expelling a drunken man from the car. (*Spade v. Lynn etc. R. R. Co.*, 298.)

16. RAILROADS—STREET-CARS—OBLIGATION TO NERVOUS PASSENGERS.—The obligation of a street railway company toward a passenger cannot be increased simply by his notifying the notifying the conductor that he has unstable nerves. (*Spade v. Lynn etc. R. R. Co.*, 298.)

17. RAILROADS—STREET-CARS—DAMAGES FOR FRIGHT CAUSED BY EJECTING DRUNKEN PASSENGER.—If the conductor of a street-car, in ejecting a drunken man therefrom, jostles against another drunken man, who falls upon a lady passenger, and the injury from the fall is slight, though she suffers physical injury from fright caused by the fall and the rest of the occurrences, she can recover, if at all, only for the fright caused by the inadvertent battery, and not for that attributable to the general disturbance. (*Spade v. Lynn etc. R. R. Co.*, 298.)

18. RAILROADS—STREET-CARS—UNAVOIDABLE ACCIDENT TO PASSENGER IN EJECTING DRUNKEN MAN—RIGHT OF ACTION.—If due care is used in expelling a drunken man from a street-car, an unavoidable battery committed on a pas-

senger's person, during the process, by the conductor's jostling another drunken man, who falls upon the passenger, seems not to be actionable. (*Spade v. Lynn etc. R. R. Co.*, 298.)

19. RAILROAD COMPANIES—NEGLIGENCE PER SE—FAILURE TO USE SELF-COUPLING DEVICES.—Failure of a railroad company to equip its freight-cars with modern self-coupling devices is negligence, per se. (*Troxler v. Southern Ry. Co.*, 580.)

20. RAILROAD COMPANIES—DUTY TO USE SAFE APPLIANCES IN GENERAL USE.—The employés of a railroad company and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience and which have come into general use. (*Troxler v. Southern Ry. Co.*, 580.)

21. RAILROAD COMPANIES—SAFE APPLIANCES—DEFENSE OF POVERTY.—If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it. (*Troxler v. Southern Ry. Co.*, 580.)

22. RAILROAD COMPANIES—FAILURE TO USE SELF-COUPLING DEVICES—NEGLIGENCE OF EMPLOYEE.—Where a railroad company fails to equip its freight-cars with modern self-coupling devices, and an employé is injured in coupling cars by hand, the company is liable, whether such employé was negligent in the manner of making the coupling, or not. (*Troxler v. Southern Ry. Co.*, 580.)

23. RAILROAD COMPANIES—INJURY TO PRIVATE PROPERTY—COMPENSATION.—If the convenience of a railroad company requires a change in its terminal yard, so that what has been done in one part thereof with one kind of appliances without injury to private property, when done in another part with another kind, inflicts serious injury upon the buildings on adjoining land, it becomes the duty of the company to acquire the right to thus virtually use the neighboring property either by purchase or through the power of eminent domain. (*Garvey v. Long Island R. R. Co.*, 550.)

24. RAILROAD COMPANIES—INJURY TO PRIVATE PROPERTY—NUISANCE.—A statute simply authorizing a railroad company to construct and operate a steam surface railroad does not confer power, either express or implied, to construct and use, without making compensation, a turntable in its terminal yard in the immediate vicinity of dwelling-houses on private property, so as to seriously, continuously, and permanently injure such premises and impair their enjoyment. Such construction and use of a turntable is a nuisance which may be enjoined. (*Garvey v. Long Island R. R. Co.*, 550.)

25. RAILROAD COMPANIES—INJURIES TO SERVANTS—ASSUMPTION OF RISKS.—A section hand who continues to use a hand-car, the brake on which he knows to be dangerously defective, assumes the risk arising from such defect and cannot recover for injuries resulting therefrom. (*Gann v. Railroad*, 687.)

26. RAILROAD COMPANIES—INJURIES TO SERVANTS—FELLOW-SERVANTS.—While a section foreman and his subordinates generally occupy the position of vice-principal and servants as to each other, yet such foreman may become the fellow-servant of his subordinates during the performance of work properly that of a fellow-servant, as by handling the brake on a hand-car used by the section gang. While engaged in such work the principal is not liable for injuries resulting to a member of the section gang from the foreman's negligence. (*Gann v. Railroad*, 687.)

27. RAILROAD COMPANIES—INJURIES TO SERVANTS—SAFE APPLIANCES—NEGLIGENCE OF SECTION FOREMAN. In the matter of providing safe appliances for the use of his subordinates, a section foreman bears to such subordinates the relation of a vice-principal, and for his negligence in this regard the company is liable. (*Gann v. Railroad*, 687.)

See Eminent Domain, 2, 3; Interstate Commerce, 1.

RAPE.

1. RAPE—FRAUD IN PERSONATING HUSBAND.—In order to constitute the crime of rape by fraud in personating the husband the defendant must resort to some device or stratagem, some artifice or trick, intending to deceive the prosecutrix and make her believe that he is her husband, and the effect of such stratagem must also be to deceive and impose on her and make her believe that he is her husband at the time the act is committed, and by this means gain her consent to the copulation. (*Payne v. State*, 757.)

2. RAPE—FRAUD IN PERSONATING HUSBAND—INDICTMENT.—An indictment which charges a rape by fraud in personating the husband must allege that the injured female is a married woman, and not the wife of the defendant; and while it is not necessary to allege the name of the husband, it is the better practice to do so. (*Payne v. State*, 757.)

3. RAPE—BY FORCE—PERSONATING HUSBAND.—If a man begins the act of copulation with a married woman while she is asleep, and upon awakening she makes no resistance, believing him to be her husband, the crime may be rape by force, but not by fraud. (*Payne v. State*, 757.)

4. RAPE—ATTEMPT TO COMMIT.—A BOY UNDER FOURTEEN YEARS OF AGE is conclusively presumed to be incapable of committing the crime of rape, whatever may be the real fact. Evidence to rebut the presumption is inadmissible. He cannot, therefore, be held guilty of an attempt to commit the offense. (*Foster v. Commonwealth*, 846.)

RECEIVERS.

RECEIVERS—FOREIGN—SUITS BY.—The right of a receiver to bring suits in a foreign jurisdiction to enforce a liability arising under the law of the state of his appointment cannot be conferred upon him absolutely by his order of appointment, but can arise only through an exercise of comity between states, and such exercise will be denied where it would be in contravention of the rights of citizens and opposed to equity. (*Wyman v. Eaton*, 193.)

See Insolvency, 2.

RECOGNIZANCE.

See Libel, 2.

RECORDING.

See Deeds, 5.

RELEASE.

RELEASE—IGNORANCE OF CLAIM.—A party cannot release a claim of which he had no knowledge, and of the existence of which he had always been fraudulently kept in ignorance. (*Cooper v. Hayward*, 330.)

See Negligence, 8.

REMAINDER.

See Devise, 3-6; Eminent Domain, 7.

RESCISSION.

See Joint Stock Companies.

REWARDS.

REWARDS—EVIDENCE TO PROVE OFFER—COPY OF GOVERNOR'S PROCLAMATION.—To prove the offer of a reward for the arrest of a person, a copy of the governor's proclamation, duly certified by the secretary of state, with whom the original is deposited, is admissible in evidence. (*McPeck v. Western U. T. Co.*, 205.)

SALE.

See Fraud.

SCHOOLS.

SCHOOLS—SCHOOL FUNDS—LIABILITY OF COUNTY.—School orders issued by the school committee upon the treasurer of the county board of education, under the North Carolina laws in force in 1886, were payable out of the school fund only, and were not a valid charge upon the public funds of the county. (*Bear v. Commisisoners*, 586.)

SENTENCE.

See Habeas Corpus, 2.

SERVICE.

See Attachment, 3, 10.

SETOFF.

1. **SETOFF—CLAIMS MUST BE MUTUAL AND DUE.**—Claims or demands sought to be set off must not only be mutual to the extent that they are owing by each to the other, but they must be due and payable, and, therefore, a claim not due cannot be set off against one that may be presently enforced. (*De Camp v. Thomson*, 570.)

2. **SETOFF—DISCRETION OF COURT IN ALLOWING.**—The question whether a setoff should or should not be decreed, rests in the discretion of the court to which the application is made, and is not subject to review. Such relief should be administered in all cases upon such equitable terms as will promote substantial justice, unless the absolute right is created by statute, or otherwise firmly established. (*De Camp v. Thomson*, 570.)

See Judgment, 9.

SITUS OF DEBT.

See Attachment, 9; Taxation.

SOCIAL CLUBS.

1. **SOCIAL CLUBS—TIPLING-HOUSE.**—A social club which furnishes intoxicating liquors to its members only, to be drunk by them on the premises where sold, is a tippling-house within the meaning of a statute prohibiting the keeping open of tippling-houses on Sunday. (*Mohrman v. State*, 74.)

2. **SOCIAL CLUBS—TIPLING-HOUSE.**—Although the selling and drinking of liquor in a social club is merely incidental to the main purposes of the club, it is none the less a tippling-house within the meaning of a statute prohibiting the keeping open on the Sabbath day of houses where liquor is furnished and drank. (*Mohrman v. State*, 74.)

3. **SOCIAL CLUBS — TIPLING-HOUSE — LIABILITY OF MANAGER.**—The manager of a social club, who is also a member and officer therein, and who exercises general superintendence over a bar therein from which intoxicating liquors are sold, is amenable to a statute prohibiting the keeping open of tippling-houses on Sunday. (*Mohrman v. State*, 74.)

SPECIFIC PERFORMANCE.

See Equity, 2.

STATUTE OF FRAUDS.

1. **STATUTE OF FRAUDS—ORAL CONTRACT.**—A court of equity cannot make valid a contract void under the statute of frauds, under pretense of aiding an imperfect attempt to execute a contract. (*Bloomfield State Bank v. Miller*, 381.)

2. **STATUTE OF FRAUDS.**—An exception to the statute of frauds taking out of its operation estates arising by act or operation of law does not include a case where the creation of the estate depends solely upon the intention of the parties to a contract. (*Bloomfield State Bank v. Miller*, 381.)

See Corporations, 6.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. **STATUTES.**—A PENAL STATUTE IS EX POST FACTO where it, in relation to the offense or its consequences, alters the situation of the party accused of the crime to his disadvantage; as where the penalty is increased, or the accused is deprived of substantial rights or privileges to which he was entitled as the law stood when the offense was committed. (*Murphy v. Commonwealth*, 266.)

2. **STATUTES—EX POST FACTO LAWS—PROCEDURE—PRISON DISCIPLINE.**—Statutes which relate to procedure or penal administration or prison discipline are not, as a general rule, objectionable as being ex post facto, though passed after the offense, even where the effect may be, in the last two instances, to enhance the severity of the confinement. (*Murphy v. Commonwealth*, 266.)

3. **STATUTES—EX POST FACTO LAWS—CREDITS FOR GOOD BEHAVIOR.**—A statute which gives a convict a right to deductions for good behavior, thus practically shortening his term of imprisonment, cannot be construed merely as a measure of prison discipline or regulation, and therefore liable to change from time to time, as the legislature may see fit, without interfering with any rights on the part of the convict. (*Murphy v. Commonwealth*, 266.)

4. **STATUTES—EX POST FACTO LAWS—INTERFERING WITH CREDITS FOR GOOD BEHAVIOR.**—If the effect of good conduct, on the part of a prisoner, under existing laws, is to shorten

his term of imprisonment, and to give him a right to his discharge at the expiration of the shortened term, a subsequent statute which has the effect of taking away the right of deduction for good behavior, or which interferes with it to the disadvantage of the convict, is clearly *ex post facto*, because it practically lengthens the sentence which was provided by law for the offense at the time when it was committed. (*Murphy v. Commonwealth*, 266.)

5. **STATUTES.—A CRIMINAL STATUTE IS TO BE CONSTRUED PROSPECTIVELY**, to apply to sentences for offenses committed after it took effect. (*Murphy v. Commonwealth*, 266.)

6. **STATUTES—CONSTITUTIONALITY.**—A law cannot be constitutional in some cases and unconstitutional in others involving like circumstances and conditions. If it is unconstitutional as to any it is unconstitutional as to all. (*Murphy v. Commonwealth*, 266.)

7. **STATUTES—EX POST FACTO LAWS.—THE LEGISLATURE** cannot, under the guise of laws relating to procedure or prison discipline or penal administration, take away or interfere with any substantial right or privilege which was secured to a party by the law as it was when the offense was committed. (*Murphy v. Commonwealth*, 266.)

8. **STATUTES.—THE TERM "EX POST FACTO"** applies only to penal or criminal matters. (*Murphy v. Commonwealth*, 266.)

9. **CONSTITUTIONAL LAW — PAYMENTS TO DRAFTED MEN BY TAXATION.**—A statute which empowers and directs the supervisors of several counties, upon a petition of the majority of the taxpayers, to raise by ordinary taxation the money needed to pay to any drafted man who served personally in the Civil War, or paid commutation money, or to his heirs a specified sum of money, with interest for a period of years, is void as being beyond the taxing power of the legislature, and as being in violation of a state constitution forbidding any county, city, town, or village to give any money to or in aid of any individual, or to incur any indebtedness except for county, city, town, or village purposes. (*Bush v. Board of Supervisors*, 538.)

10. **WAGES—PREFERENCE TO CLAIMS FOR—CONSTRUCTION OF STATUTE—SALARY.**—The word "wages," in a statute giving a preference to "the wages of the employés, operatives, and laborers" in the hands of a receiver, conveys the idea, in its application to laborers and employés, of subordinate occupation which is not very remunerative. Such a statute is not, therefore, designed to give a preference to the salaries and compensation due to officers and employés of a corporation occupying superior positions of trust or profit. (*Matter of Stryker*, 489.)

11. **WAGES—PREFERENCE TO CLAIMS FOR—LIMITATION UPON WORD "EMPLOYES."**—In determining what claims shall be preferred, under a statute which gives a preference to "the wages of the employés, operatives, and laborers" of corporations in the hands of a receiver, the general and comprehensive word "employés" must be limited by the more specific words, "operatives and laborers." (*Matter of Stryker*, 489.)

12. **WAGES—PREFERENCE TO CLAIMS FOR—CONSTRUCTION OF STATUTE.**—A statute giving a preference to "the wages of the employés, operatives, and laborers" of corporations in the hands of a receiver is intended to limit the preference to the particular class whose claims would be properly expressed by the use of the word "wages." (*Matter of Stryker*, 489.)

13. STATUTES—CONSTRUCTION—ANALOGOUS WORDS.—When two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and to give color and expression to each other. (Matter of Stryker, 489.)

14. STATUTES—GENERAL LAW—ILLUSTRATION—WORKMEN'S UNION LABEL ACT.—An "act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workmen or women," where there is nothing in it limiting its provisions to any particular locality of the state, or to any designated association or union of workmen or women, is not a local or private law, but a general one, and does not, therefore, contravene a constitutional provision that the legislature shall not pass a private or local bill granting any exclusive privilege or franchise. (Perkins v. Heert, 483.)

15. STATUTES—GRANT OF EXCLUSIVE PRIVILEGE—STATE POLICY.—If a state constitution authorizes a grant, through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state. (Perkins v. Heert, 483.)

16. STATUTES—ACT HAVING BUT ONE SUBJECT EXPRESSED IN ITS TITLE—ILLUSTRATION.—One subject only is mentioned in the title of an act entitled, "An act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workmen or women," and that is the better protection of skilled labor by the registration of labels, et cetera, covering the products of such labor. (Perkins v. Heert, 483.)

17. STATUTES NOT CONTRARY TO PUBLIC POLICY—WORKMEN'S UNION LABEL ACT—CONSTITUTIONALITY.—An "act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workmen or women" is not unconstitutional and void, for the reason that it is contrary to public policy, in that it unjustly discriminates in favor of the labor of members of associations or unions as against that of nonunion workmen. (Perkins v. Heert, 483.)

18. STATUTES—GRANT OF EXCLUSIVE PRIVILEGES UNDER GENERAL LAW.—An exclusive privilege or franchise is authorized, if obtained under general laws, where the state constitution authorizes the legislature to pass general laws, under which such a privilege or franchise may be granted. (Perkins v. Heert, 483.)

19. WAGES—PREFERENCE OF CLAIMS FOR—SALARIED PERSONS WHO CANNOT CLAIM.—Under a statute which gives a preference to "the wages of the employés, operatives, and laborers" of corporations in the hands of a receiver, the claims of those in the employ of an insolvent manufacturing company, such as a clerk and bookkeeper, the superintendent, shop foreman, and a draftsman, all under salaries ranging from one hundred to two hundred and twenty-five dollars per month, are not entitled to preference as claims for wages. (Matter of Stryker, 489.)

20. CONSTITUTIONAL LAW—TITLE OF ACT.—An act known as the "cold storage act," and entitled, "an act to define and prevent cold storage in a local option county, precinct, city, town, or subdivision of a county, and to affix a penalty for running, keeping, or maintaining them in such county, city, or town, or subdivision, sufficiently embraces the subject-matter of the act, and is not within

a constitutional provision invalidating laws where the substance of the act is not embraced in the title. (Ex parte Brown, 743.)

21. **STATUTES — PRESUMPTION OF CONSTITUTIONALITY.**—All intendments are in favor of the constitutionality of every statute passed with requisite form and ceremony. (Austin v. State, 703.)

22. **CONSTITUTIONAL LAW. — THE TERRITORIAL LAW** of Utah so far as it purported to confer general common-law and chancery jurisdiction on probate courts is void. (In re Christensen, 794.)

See Adoption, 1, 4, 5; Bankruptcy; Building and Loan Associations, 6, 11, 12; Corporations, 36; Deeds, 3; Descent; Dower, 1, 3; Interstate Commerce, 5, 6; Larceny; Libel, 3; Municipal Corporations, 15, 21; Police Power, 3, 6, 8, 9.

STREET RAILWAYS.

See Railroads, 15-18.

SUBROGATION.

See Appeal, 14; Insolvency, 2.

SURETIES.

1. **SURETIES—APPEAL BONDS AND BAIL—PRIMARY LIABILITY—ILLUSTRATION—RELEASE OF SURETIES—REIMBURSEMENT.**—If the plaintiff in a civil action obtains an order for the arrest of the defendant, who is discharged upon giving bail, and the action results in a judgment for the plaintiff, whereupon undertakings on appeal are given, one to the general term, and the other to the court of appeals, with conditions that the sureties in each case will pay the amount of the judgment and costs in the event of an affirmance, the plaintiff, in the event of an affirmance at the general term and of a judgment for costs in the court of appeals, cannot, where he collects from the general term sureties the whole amount due him, except on the judgment for costs in the court of appeals, recover thereafter from the bail, either for his own benefit or that of a general term surety, anything more than the amount due on the judgment for costs in the court of appeals, and not even that if he has released the court of appeals sureties; and, if he recovers the amount of the judgment for costs in the court of appeals, from the bail, the latter will have the right of reimbursement from the court of appeals sureties. (Culliford v. Walser, 437.)

2. **SURETIES—DIFFERENT SETS OF, INCLUDING BAIL—ORDER OF LIABILITY.**—As between different sets of sureties who undertake to secure the same debt, although in different stages of legal proceedings, the primary liability rests upon the last set; and bail, being sureties, are, therefore, within the same rule. (Culliford v. Walser, 437.)

See Contracts, 7.

TAXATION.

TAXATION—SITUS OF A DEBT.—The situs of a debt for purposes of taxation, and usually for all purposes, is with the creditor. (Balk v. Harris, 606.)

See Legislature; Mandamus, 1; Municipal Corporations, 13, 14; Statutes, 9.

TAX TITLE.

See Cotenancy, 6.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—NOTICE OF IMPORTANCE OF MESSAGE.—In an action for damages occasioned by the delay of a telegraph company in delivering a message, extrinsic evidence is admissible to show that the company had notice of the importance of the message. (*McPeck v. Western U. T. Co.*, 205.)

2. TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY OF MESSAGE.—The liability of a telegraph company to the sendee of a message for damages resulting from a delay in delivery is not one arising from contract, but is based upon its negligence in the performance of a duty in its public capacity as a common carrier of messages. (*McPeck v. Western U. T. Co.*, 205.)

3. TELEGRAPH COMPANIES—DAMAGES FOR DELAY IN DELIVERY OF MESSAGE—LOSS OF REWARD.—Where a person has laid a plan for the capture of a fugitive from justice with a view to obtaining the reward offered therefor, and has notified a telegraph agent that he is expecting a telegram of great importance to the success of his plan, and the agent knows that prompt delivery of such message will be necessary, the telegraph company will be liable in damages to the amount of such reward if the agent's delay in delivery of the message frustrates the sendee's plan. It is not necessary that the agent have actual notice of the offer of the reward, he being charged with knowledge that such offer might be made. (*McPeck v. Western U. T. Co.*, 205.)

4. TELEGRAPH COMPANIES—NEGLIGENCE IN DELIVERY OF MESSAGE—BURDEN OF PROOF.—In an action against a telegraph company for the loss of a reward offered for the capture of a fugitive from justice, which loss is alleged to have resulted from the negligence of the defendant in delivering a certain telegram, the burden of proof rests upon the plaintiff, and the question whether or not such loss resulted from the negligence alleged is for the jury. (*McPeck v. Western U. T. Co.*, 205.)

5. TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY OF MESSAGE—OFFICE HOURS.—An agent of a telegraph company undertaking to deliver a message outside of office hours is acting within the scope of his agency, and the company is liable for his failure to exercise reasonable diligence. Whether or not such diligence was exercised is a question for the jury. (*McPeck v. Western U. T. Co.*, 205.)

6. TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—MEASURE OF DAMAGES.—A person injured by the delay of a telegraph company in delivering a message to him is not limited in his recovery to such damages as might reasonably have been within the contemplation of the parties, but recovery may be had for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force. (*McPeck v. Western U. T. Co.*, 205.)

7. TELEGRAPH COMPANIES—ACTION FOR ERRONEOUS TRANSMISSION OF MESSAGE—EVIDENCE.—In an action against a telegraph company for damages resulting from a contract entered into in reliance upon an erroneously transmitted message, the plaintiff is properly allowed to testify that the contract in question would not have been entered into except for such error

on the part of the defendant. (*Hasbrouck v. Western U. T. Co.*, 181.)

8. TELEGRAPH COMPANIES—DAMAGES FOR ERRONEOUSLY TRANSMITTED MESSAGE—DUTY OF PLAINTIFF TO RESCIND CONTRACT ENTERED INTO IN RELIANCE UPON.—Where a principal has been influenced through the erroneous transmission of a telegram from his agent to authorize the latter to enter into a contract of settlement with the former's creditor which he would not have authorized except for such erroneous transmission, he is not bound to take steps to rescind the contract before bringing suit against the telegraph company for damages suffered. (*Hasbrouck v. Western U. T. Co.*, 181.)

See Agency.

TORTS.

TORTS—MALICE—DEFINITION.—The term "malice," as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. (*Brown v. Brown*, 574.)

TRESPASS.

1. TRESPASS—INJUNCTION AGAINST.—If strong and aggravated instances of continuing trespass are shown, which must necessarily result in substantial damages to plaintiff's property that are in no way offset by benefits, a permanent injunction may be issued, although the amount of damages is not fixed. (*Garvey v. Long Island R. R. Co.*, 550.)

2. TRESPASS—INJUNCTION AGAINST.—If one who owns valuable mining property and a water supply at a considerable distance therefrom digs a trench and inserts a pipe line therein under the surface of worthless, uncultivated, and unused land of another from his water supply to his mine, covering the trench with the material taken out, and not causing the landowner any damage except nominal, the latter is not entitled to an injunction restraining the trespass, when it appears that to restrain the laying of the pipe line would cause irreparable damage to the mine-owner and destroy a large industry without any benefit to the landowner. In such case, the remedy at law being adequate the landowner must be required to resort to such remedy for the recovery of damages attending the trespass. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

See Railroad Companies, 1-4.

TRIAL.

1. TRIAL—ERRONEOUS INSTRUCTIONS.—It is not ground for reversal of a judgment that an instruction assumes as proven a fact established by the evidence without contradiction. (*Illinois Central R. R. Co. v. King*, 93.)

2. TRIAL—IMPANELING JURY—EXAMINATION ON VOIR DIRE.—In impaneling a jury in a trial for homicide, defendant's counsel should not be allowed, in the examination of jurors on their voir dire, to ask them whether defendant's failure to testify in his own behalf would prejudice him in their minds. (*Commonwealth v. Wireback*, 625.)

3. TRIAL—REFUSAL OF COURT TO SUBMIT ISSUES.—Where every phase of a defendant's contention could be and was presented without prejudice under the issue submitted by the court, the refusal to submit other issues, though asked, is not error. (*Kendrick v. Life Ins. Co.*, 592.)

4. TRIAL—CRIMINAL CASES—OBJECTION TO GENERAL COURSE PURSUED BY PROSECUTING ATTORNEY.—If a prosecuting attorney, in a criminal case, persists, after repeated objections, in making improper statements during his address to the jury, and such objections go to the general course pursued by him, no further objection or exception is necessary after the court sanctions such course, pronouncing it "perfectly proper." (*People v. Fielding*, 495.)

5. TRIAL—IMPROPER APPEAL TO JURY—CURING OF ERROR.—INSTRUCTIONS to the jury do not always neutralize, either as a matter of law or fact, the effect of improper remarks in their presence. (*People v. Fielding*, 495.)

6. TRIAL—CRIMINAL CASES—ARGUMENT—PROSECUTING ATTORNEY—DUTY OF.—The prosecuting attorney, in a criminal case, represents the majesty of the people, and, having no responsibility, except fairly to discharge his duty, should put himself under proper restraint, and should not, in his remarks before the jury, go beyond the evidence or the bounds of a reasonable moderation. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest. (*People v. Fielding*, 495.)

7. TRIAL—CRIMINAL CASES—IMPROPER APPEAL TO JURY—CORRECTION OF ERROR.—When a prosecuting attorney, in a criminal case, makes improper statements in his address to the jury, and the court seeks to correct them, the correction should be as broad as the error, and cover substantially the same ground. It should be clear and specific enough to repel the presumption of injury. Otherwise, the error is not cured. (*People v. Fielding*, 495.)

See Homicide, 13.

TRUCKMEN.

See Carriers, 2, 3; Negligence, 2, 8.

TRUSTS.

See Wills, 8-10.

"UPSET" BIDS.

See Judicial Sales, 2, 4-6.

USURY.

See Building and Loan Associations, 1, 5, 7, 8, 11, 12.

VALUE.

See Estates.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—ASSUMPTION OF DEBTS—PRIMARY LIABILITY OF PURCHASER.—When a purchaser assumes the payment of certain debts of his vendor, in considera-

tion of a conveyance of land, he is personally answerable therefor, and, as between the vendor and himself, he is primarily liable for such debts. (*Moore v. Triplett*, 882.)

2. **VENDOR AND PURCHASER—VARIANCE BETWEEN CONTRACT FOR SALE OF LAND AND DEED—PRESUMPTION—BURDEN.**—In the event of a conflict between the terms of an agreement for the sale of land and a subsequent deed to it, the presumption is, that the purposes of the parties were altered, and that the deed expresses the final and true agreement between them. Hence, the burden of proof is upon him who denies that the writing speaks the final agreement to rebut this presumption by the clearest and most satisfactory evidence. (*Snyder v. Grandstaff*, 863.)

3. **VENDOR AND PURCHASER—BURDEN OF PROVING NOTICE TO PURCHASER FOR VALUE.**—One who alleges that a purchaser for value had notice must assume the burden of proving it, and mere proof of confidential relations between the grantor and the grantee is insufficient. (*Snyder v. Grandstaff*, 863.)

4. **VENDOR AND PURCHASER—AFFIRMATIONS OF TITLE.**—Purchasers for value have a right to rely on the affirmations of grantors, and grantors are bound by their affirmations of title. (*Snyder v. Grandstaff*, 863.)

5. **VENDOR AND PURCHASER—NOTICE TO PURCHASER FOR VALUE—SUFFICIENCY OF.**—To charge a purchaser for value with notice, it is necessary that the evidence should establish notice, either actual or constructive. Otherwise, it is insufficient. (*Snyder v. Grandstaff*, 863.)

6. **VENDOR AND PURCHASER—LATENT EQUITIES—MUTUAL MISTAKE.**—A PURCHASER FOR VALUE is not affected by any latent equity, whether by lien, encumbrance, trust, fraud, or any other claim; and a mutual mistake stands on the same footing as any other equity. (*Snyder v. Grandstaff*, 863.)

See Judgment, 1, 2.

VOLUNTARY ASSOCIATIONS.

See Associations, 7.

WAGES.

WAGES—APPLICATION OF TERM—SALARY—FEE.—The word "wages" is applied, in common parlance, specifically to the payment made for manual labor, or other labor of a menial or mechanical kind, as distinguished from salary, and from fee, each of which denotes compensation paid to professional men. (*Matter of Stryker*, 489.)

See Statutes, 10-12, 19.

WARRANTY.

See Waterworks and Water Companies, 4.

WATERS AND WATERCOURSES.

1. **WATERS AND WATERCOURSES—PERCOLATING WATER**, so long as it remains in an artificial tunnel or mining claim of the proprietor of the land, is not open to appropriation by another. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

2. **WATERS AND WATERCOURSES—PERCOLATING WATERS.—PRESCRIPTIVE RIGHT TO.**—Whenever percolating water is so hidden in the earth that its course is not discoverable

from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

3. **WATERS AND WATERCOURSES—PERCOLATING WATER.**—A PERSON MAY LAWFULLY DIG A WELL on his own land, though thereby he destroys the subterranean, undefined, percolating water of his adjoining neighbor's spring, and no action can be maintained therefor. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

4. **WATERS AND WATERCOURSES—PERCOLATING WATER.**—If water percolates through and under the surface of the earth upon the land of one person and comes to the surface just before it empties itself upon the land of another, the owner of such land has no right to demand that such percolation shall continue. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

5. **WATERS AND WATERCOURSES—PERCOLATING WATER—APPROPRIATION.**—Percolating water, after passing into an underground artificial tunnel, and not naturally flowing from or into a natural stream with a well-defined channel, banks, and course, is not subject to appropriation by another while it remains in the tunnel upon the owner's land; but if the water is allowed to flow into an artificial lake upon public land it is then subject to appropriation. The appropriator does not, however, thereby acquire an easement in the tunnel nor a prescriptive right to have the water flow from the tunnel into the lake uninterruptedly and continuously, although he has continually used the water of the lake for a long period of years. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

6. **WATERS AND WATERCOURSES—PERCOLATING WATER—APPROPRIATION.**—The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating waters and subterranean streams with undefined and unknown courses and banks. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

7. **WATERS AND WATERCOURSES—PERCOLATING WATER** which has been gathered in artificial tunnels or ditches and allowed to flow from the proprietor's land to an inferior proprietor, and has been used by him a greater period of time than that allowed by the statute of limitations, does not become his by prescriptive title. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

8. **WATERS AND WATERCOURSES—PERCOLATING WATER.**—The owner of the soil is entitled to the waters percolating through it. Such water is not subject to appropriation until it leaves his land. (*Crescent Min. Co. v. Silver King Min. Co.*, 810.)

WATERWORKS AND WATER COMPANIES.

1. **WATER COMPANIES—BREACH OF CONTRACT—NATURAL AND PROXIMATE RESULT—DAMAGE BY FIRE TO TAXPAYER.**—Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by a citizen and taxpayer by the destruction of buildings, by the failure to so furnish water, is a natural and proximate consequence of such breach of the undertaking. (*Gorrill v. Water Supply Co.*, 598.)

2. **WATER COMPANIES—LIABILITY FOR DISTRIBUTING POLLUTED WATER—EVIDENCE OF SUBSEQUENT PRECAUTIONS.**—In an action against a water company for the death of a

person, occasioned by using impure water furnished by it, it is improper to admit evidence that greater precautions were taken by the defendant, after the occurrence complained of to secure pure water, than were taken before. (*Green v. Ashland W. Co.*, 911.)

3. **WATER COMPANIES—LIABILITY FOR DISTRIBUTING POLLUTED WATER—KNOWLEDGE OF PERSON USING SUCH WATER.**—A water company which knowingly distributes water which, from a cause not discoverable by the exercise of reasonable care, is dangerous for domestic use, it owes the duty to its customers of disclosing such danger, and a failure to do so is fraud in law, rendering the company liable to any person injured thereby without fault on his part, and the failure of duty amounts to actionable negligence, to which the same liability is incident. But if the person injured used the water with knowledge, actual or constructive, of its dangerous condition, no liability attaches to the company. (*Green v. Ashland W. Co.*, 911.)

4. **WATER COMPANIES—LIABILITY FOR DISTRIBUTING POLLUTED WATER—WARRANTY OF QUALITY.**—A water company engaged in distributing water for compensation does not impliedly warrant the quality of the water carried and distributed. (*Green v. Ashland W. Co.*, 911.)

5. **WATER COMPANIES—IMPURE WATER—CONTRIBUTORY NEGLIGENCE IN USING.**—Where it has been for some time a matter of common knowledge that water furnished by a water company is dangerously impure, it will be presumed that a person of average intelligence living in the community had notice of such fact, and, unless such presumption is rebutted, he will be deemed guilty of contributory negligence if he uses such water. (*Green v. Ashland W. Co.*, 911.)

6. **WATER COMPANIES—LIABILITY FOR FURNISHING IMPURE WATER—EVIDENCE.**—Where it is sought to impose upon a water company a liability for injuries occasioned by impure water furnished by it, it is error to admit in evidence newspaper comments generally irrelevant to the issue, and of a sort tending to prejudice the jury against the defendant. (*Green v. Ashland W. Co.*, 911.)

WILLS.

1. **WILLS—EXECUTION—PROOF OF—ATTESTING WITNESSES.**—Where a will is signed by the testator's making his mark, and the subscribing witnesses are dead or beyond the jurisdiction of the court, proof of their handwriting is a compliance with the law as to due execution; and it need not be proved that the testator had the will read over to him, or was informed of its contents, before he signed it. (*Scott v. Hawk*, 228.)

2. **WILLS—EXECUTION—PUBLICATION.**—In the execution of a will, nothing more than compliance with the statute is necessary, and publication is not necessary unless made so by statute. (*Scott v. Hawk*, 228.)

3. **WILLS—SIGNATURE—TESTATOR'S MARK.**—Where a testator, being unable to write his signature to his will, makes his mark instead, the will so executed is "signed" within the meaning of the law. (*Scott v. Hawk*, 228.)

4. **WILLS—SIGNING WITH MARK.**—Where a testator signed his will by making his mark, it is not essential to the valid execution of the will that his name be written by one of the attesting witnesses. (*Scott v. Hawk*, 228.)

5. WILLS—ILLEGITIMATE CHILD AS AN "HEIR BY BLOOD."—An illegitimate child is the "heir by blood" of his mother within the meaning of a will wherein the term "heirs by blood" is used, where it plainly appears that the testator intended by the use of that term to indicate those persons whose relationship was by some tie of consanguinity; and to exclude all others, such as husband, wife, or adopted children. (*Hayden v. Barrett*, 295.)

6. WILLS—DECLARATIONS OF TESTATOR AS EVIDENCE. Where a will is attacked on the ground of forgery, declarations of the testator as to his intentions are admissible for the purpose of corroboration, but such evidence is not sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses. (*Swope v. Donnelly*, 637.)

7. WILLS—DECLARATIONS OF TESTATOR—NOT PROPERLY ADMISSIBLE.—Where the issue is whether or not a will purporting to have been executed on a certain day is a forgery, declarations of the testator that a will with which he was satisfied was in existence two months before that day, also an expression of intention made by him five years before that time, are irrelevant and inadmissible. (*Swope v. Donnelly*, 637.)

8. WILLS — CHARITABLE TRUST — DESIGNATION OF TRUSTEE.—If a testator, after providing for certain beneficiaries in his will, declares therein that "after the death of each one I desire that my executors shall make over to the presiding bishop of the Church of Jesus Christ of Latter-Day Saints the half of my estate from which that wife's income was derived. The presiding bishop shall receive it in trust and expend the annual income according to his discretion, for the benefits of the members of the Church of Jesus Christ of Latter-Day Saints," the will clearly designates such presiding bishop as trustee and sufficiently describes the beneficiaries under the will. (*Staines v. Burton*, 788.)

9. WILLS—CHARITABLE TRUSTS.—A bequest by will to the presiding bishop of a certain church, in trust, to expend the annual income, according to his discretion, for the benefit of the members of such church, "whether it be for public schools, parks, watering cities, acclimatizing foreign plants, or anything else whereby the members may be benefited, creates a charitable use or trust, and is not within the rule against perpetuities. (*Staines v. Burton*, 788.)

10. WILLS—CHARITABLE TRUSTS—CONSTRUCTION.—If a charitable intent appears on the face of a will, but the terms used are broad enough to allow the fund being applied either in a lawful or unlawful manner, the gift must be supported, and its application restrained within the bounds of the law. (*Staines v. Burton*, 788.)

11. WILLS—CONDITIONS SUBSEQUENT—IMPOSSIBILITY OF PERFORMANCE—EFFECT OF.—If a testator devises to his wife, for her life, his "homestead and five acres around the house," with the understanding that his son will support and take care of her, and that, at her death, the "homestead and land shall return to" the son "as compensation therefor," but the wife of the testator dies in his lifetime, and he makes no change in his will, the whole will, taken together, including the wish therein expressed that the son shall support and provide for his two sisters as long as they remain single, shows that the condition upon which the son is to take the estate is a condition subsequent, and not a condition precedent, and its performance having been rendered impossible by the act of God, in the death of the wife in the lifetime of the testator, the son holds the estate by an absolute title, as if the testator had attached no condition to the devise, for the act on

which the estate depends does not necessarily precede the vesting of the estate, but may accompany or follow it. (*Burdis v. Burdis*, 825.)

12. WILLS—CONDITIONS PRECEDENT AND SUBSEQUENT—WHAT ARE—DISTINCTION.—There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction. The words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and, unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent. (*Burdis v. Burdis*, 825.)

See Devise.

WITNESSES.

1. WITNESSES—TESTIMONY OF EXPERTS.—In an action for damages occasioned by fire ignited from sparks escaping from a road-roller engine, it being alleged that the defendant was negligent in failing to provide such engine with a spark arrester, expert witnesses, in testifying, may be allowed to exhibit a model of a locomotive engine to the jury to illustrate the use of a spark arrester, and to indicate how it could be applied to the roller-engine in question, but they should not be allowed to use such models for any further purpose. (*McMahon v. Dubuque*, 143.)

2. WITNESSES—MATTERS OF OPINION.—In determining the condition of a house at the time of its destruction, whether or not it was in good repair, a witness may describe the house in detail, but he should not be permitted to testify whether or not the house was in good repair, such testimony being merely an opinion. (*McMahon v. Dubuque*, 143.)

3. WITNESSES—IMPEACHING ONE'S OWN.—A party cannot show inconsistent statements made by his own witness for the purpose of impeaching him. (*Fall Brook Coal Co. v. Hewson*, 466.)

4. WITNESSES—OFFER OF—WHEN COMPLETE.—A person is not made a witness so as to burden the party calling him with the necessity of supporting his character to the end of the trial, until he is called, sworn, and some material question is asked and answered. (*Fall Brook Coal Co. v. Hewson*, 466.)

5. WITNESSES—OFFER OF—IMPEACHMENT.—If a party calls a witness, but excuses him after he is sworn, but before any material question is asked, he is not afterward precluded from impeaching his credibility by contradicting him, where the witness gives material testimony for the other side. (*Fall Brook Coal Co. v. Hewson*, 466.)

6. WITNESS, FAILURE TO CALL—PRESUMPTION—INSTRUCTIONS.—The omission of the defendant to call its motorman as a witness, though available, will justify the court in instructing the jury that, in weighing the evidence introduced, they are at liberty to indulge in the presumption that the testimony of the motorman, if introduced, would not have been favorable to the defendant's cause. (*Fonda v. St. Paul City Ry. Co.*, 341.)

7. WITNESSES—RULING OUT QUESTIONS CALLING FOR AN OPINION.—A question which calls for an opinion of the witness in regard to the legal effect of a contract is properly ruled out. (*McIsaac v. Northampton Elec. L. Co.*, 244.)

8. WITNESSES.—IMMATERIAL QUESTIONS asked of a witness are properly ruled out. (*Melisaac v. Northampton Elec. L. Co.*, 244.)

9. WITNESSES—EXAMINATION OF—STRIKING OUT ANSWER.—A witness' answer which is not responsive to the question may rightly be stricken out. (*Melisaac v. Northampton Elec. L. Co.*, 244.)

10. WITNESSES—EXPERTS—QUESTION OF SANITY—PENITENTIARY WARDEN.—Where the prisoner's insanity is set up in defense of a prosecution for homicide, and expert testimony is given in support of such plea, together with evidence of acts and declarations of the defendant tending to show insanity, a penitentiary warden who, through a long period of service, has had opportunity to study criminals, is competent to testify that very many prisoners feigned insanity and delusions, and that some had deceived him and physicians. (*Commonwealth v. Wireback*, 625.)

11. WITNESSES — CROSS-EXAMINATION — MAKING ONE PARTY'S OWN WITNESS.—When the matter elicited from a witness in his examination in chief is departed from, or when the facts sought to be established on cross-examination are not pertinent or germane to those elicited in the examination in chief, the witness becomes the witness of the party attempting to prove such matter. (*Jones v. State*, 719.)

12. WITNESSES — COMPETENCY — WIFE IN CRIMINAL CASE.—A wife can be a witness for her husband, but not against him, and the state in a criminal case has the right to cross-examine her pertaining to the facts sworn to by her on direct examination. When the state leaves the matter elicited in the examination in chief, and attempts to prove independent material facts by her, it makes her its witness and a witness against her husband against his objection. This cannot be legitimately done. To permit it is reversible error. (*Jones v. State*, 719.)

13. WITNESSES—IMPEACHMENT.—If a witness is attacked by showing that he has testified corruptly, or has recently fabricated his testimony, he can be supported by proof that that he had at a prior time made the same statements, before any motive could have existed. (*Jones v. State*, 719.)

14. WITNESSES—EXPERTS—OPINION EVIDENCE.—Where it is sought to recover from a water company for death from typhoid fever, which disease, it is alleged, was communicated to the deceased by impure water furnished by the defendant company, expert witnesses should not be permitted to give opinions going to the question of how the disease was contracted, based upon the evidence introduced upon that question, such evidence being contradictory. (*Green v. Ashland W. Co.*, 911.)

15. WITNESSES — EXPERTS — PHYSICIANS — CAUSE OF DEATH.—The rule that a physician may testify as to the cause of death, from personal examination or knowledge, extends no farther than the immediate cause of death, and not to what set the cause in motion. (*Green v. Ashland W. Co.*, 911.)

See Appeal, 6, 10; Evidence, 12; Homicide, 11-13; Insane Persons, 4; Wills, 1.

WRITS.

A WRIT OF ERROR MUST BE DECIDED according to the law as it was at the time the judgment was rendered, without any consideration of subsequent acts. (*Wilson v. Hundley*, 837.)

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